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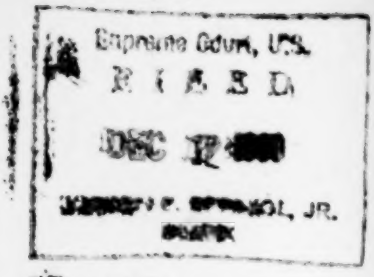

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

POCONO GREEN, INC.,

Petitioner,

vs.

BOARD OF SUPERVISORS OF KIDDER TOWNSHIP, PENNSYLVANIA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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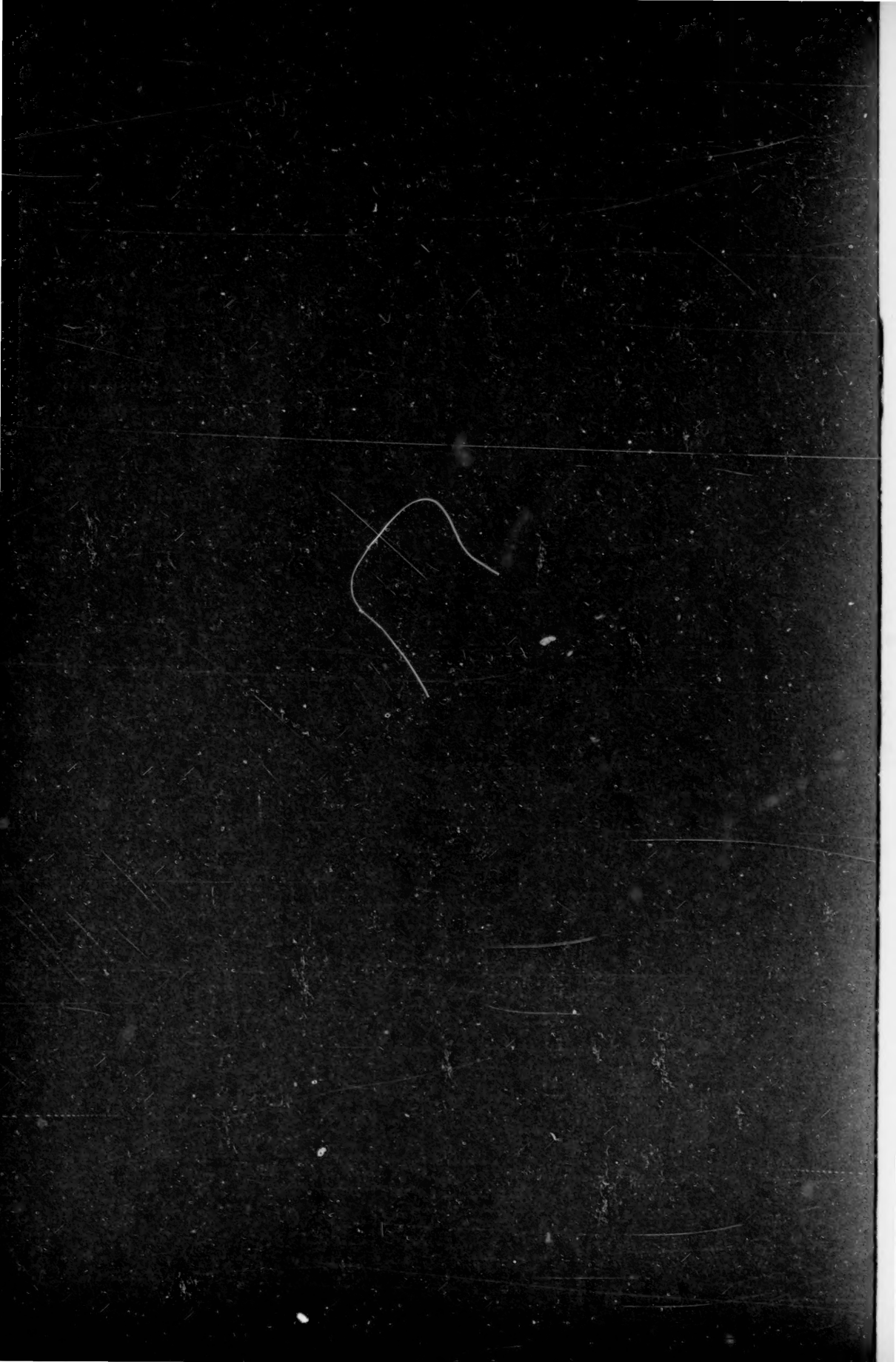

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
I.	THIS COURT LACKS SUBJECT MATTER JURISDICTION	1
II.	BECAUSE THE ISSUES RAISED BY POCONO GREEN WERE NOT PRESENTED OR PASSED UPON BELOW, THIS COURT SHOULD DENY CERTIORARI	6
III.	THERE ARE INDEPENDENT AND ADEQUATE STATE GROUNDS TO SUSTAIN THE DECISION BELOW. .	9
IV.	THE PETITION FAILS TO COMPLY WITH THE RULES OF THIS COURT	13
V.	POCONO GREEN'S PETITION MISSTATES THE LAW	15
VI.	THE PETITION EXAGGERATES THE IMPORTANCE OF THE ISSUES. IN THE CONTEXT OF THE PRESENT CASE, THESE ISSUES ARE OF LITTLE SIGNIFICANCE TO ANYONE OTHER THAN POCONO GREEN	23
CONCLUSION		26
CERTIFICATE OF SERVICE		

TABLE OF AUTHORITIES

Cases	Page
Altman v. Ryan, 435 Pa. 401, 257 A.2d 583 (1969)	10
Arlington Heights v. Metropolitan Housing Development Co., 429 U.S. 252 (1977)	23
Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)	4, 5
Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988)	19, 21
County Line Joint Venture v. City of Grand Prairie, 839 F.2d 1142, 1145 (5th Cir.), cert. denied, 109 S. Ct. 223 (1988)	17
Division 85, Amalgamated Transit Union v. Port Authority of Allegheny County, 417 Pa. 299, 208 A.2d 271 (1965)	10
Harris v. County of Riverside, 904 F.2d 497 (9th Cir. 1990)	20
Henry v. Mississippi, 379 U.S. 443, rehearing denied, 380 U.S. 926 (1965)	9
Illinois v. Gates, 462 U.S. 213 (1983)	6

TABLE OF AUTHORITIES (CONT'D)

Cases	Page
In re Dorrance's Estate, 309 Pa. 151, 163 A. 303, cert. denied sub nom. Dorrance v. Commonwealth of Pennsylvania, 287 U.S. 660 (1932), reargument denied, 172 A. 900 (Pa.), cert. denied, 288 U.S. 617 (1933)	10, 12
Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986) . .	17, 18
Osborne v. Ohio, 110 S. Ct. 1691, rehearing denied, 110 S. Ct. 2905 (1990)	9
Rogin v. Bensalem Township, 616 F.2d 680 (3d Cir. 1980), cert. denied, 450 U.S. 1029 (1981)	16
South Gwinnett Venture v. Pruitt, 491 F.2d 5 (5th Cir.), cert. dismissed, 416 U.S. 901, cert. denied, 419 U.S. 837 (1974)	15, 17
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	19
Webb v. Webb, 451 U.S. 493 (1981)	2, 6, 8, 15

TABLE OF AUTHORITIES (CONT'D)

Statutes

	Page
28 U.S.C. § 1257	1
Pa. R. App. P. 302	9

Rules of Court

Sup. Ct. R. 10.1	15, 22
Sup. Ct. R. 14.1	14
Sup. Ct. R. 14.5	13

Petitioner Pocono Green, Inc. ("Pocono Green") has filed a petition seeking a writ of certiorari to the Pennsylvania Supreme Court. Pursuant to Sup. Ct. R. 15, Respondent Board of Supervisors of Kidder Township, Pennsylvania, ("the Board") hereby submits this brief setting forth the reasons why certiorari should be denied.

I. THIS COURT LACKS SUBJECT-MATTER JURISDICTION.

Pocono Green's petition invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). See Petition for Certiorari at 1.[1] Section 1257 vests this Court with subject-matter jurisdiction to review state court judgments where, in pertinent

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[1]Page references to Pocono Green's petition will be designated by the reference "Petition for Certiorari at ___." Page references to the appendix attached to Pocono Green's petition will be designated by the reference "(App. at ___)."

part, "any . . . right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." Because of the requirement that any constitutional issue to be addressed by this Court have been "specially set up or claimed" in the proceedings sought to be reviewed, "[i]t is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record shows either expressly or by clear implication that the federal claim was adequately presented in the state system." Webb v. Webb, 451 U.S. 493, 496-97 (1981).

In the present case, Pocono Green attempts to bait the hook of certiorari with a procedural due process issue. However, Pocono Green did not adequately present, nor did the Pennsylvania Supreme

Court pass upon, this issue below.

In Pocono Green's three briefs below--to the Court of Common Pleas, to the Commonwealth Court, and to the Pennsylvania Supreme Court[2]--Pocono Green did not even hint at, let alone argue, the existence of any due process issues arising under the due process clause of the United States Constitution. The phrase "due process" does not appear anywhere in Pocono Green's briefs. Only once, indeed, is the word "constitution" even mentioned, and this passing reference occurs in the context of a discussion concerning the interpretation of Penn-

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[2]Copies of these briefs are attached in an appendix hereto. Because the attached appendix supplements the appendix accompanying Pocono Green's petition, pages in these briefs will be designated by the reference "(Supp. App. at ___)."

sylvania zoning ordinances.[3] At each step of the proceedings below, in other words, Pocono Green relied exclusively on Pennsylvania state law. Not surprisingly, therefore, all three of the opinions below ruled exclusively on matters of Pennsylvania state law.

The procedural due process theory was drummed up as an afterthought. Not until filing its application for reargu-

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[3]In its brief to the Court of Common Pleas, Pocono Green remarked, "in order to remain constitutional, zoning ordinances [are] required to have preannounced, objective criteria so that owners of land . . . know what [is], and [is] not, permitted" (Supp. App. at A-24 to A-25). In context, this offhand allusion appears to refer to the Pennsylvania rather than to the United States Constitution. But even if Pocono Green meant to refer to the latter document, the reference was too ambiguous to preserve the issue. See Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 78 (1988) ("even if the Mississippi Supreme Court understood appellant to be offering a constitutional challenge, it may very well have taken that challenge to be anchored in the State Constitution").

ment with the Pennsylvania Supreme Court did Pocono Green for the first time raise this issue (App. at 13a-14a). The Pennsylvania Supreme Court, without opinion, denied the application (App. at 26a).

As illustrated by Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988), Pocono Green's last-minute ploy was too little, too late. The petitioner in Banker's Life sought to have this Court review a punitive damages award on the ground that the size of the award violated several provisions of the United States Constitution, among them the due process clause. Id. at 76. In its appeal to the Mississippi Supreme Court, though, the petitioner had not mentioned these constitutional issues. Only in its petition for rehearing with the Mississippi Supreme Court, which was denied without opinion, did the petitioner raise

them for the first time. Id. at 75-76. This Court declined to consider the issues because "these claims were not raised and passed upon in state court." Id. at 76. Such is likewise the situation here.

II. BECAUSE THE ISSUES RAISED BY POCONO GREEN WERE NOT PRESENTED OR PASSED UPON BELOW, THIS COURT SHOULD DENY CERTIORARI.

Admittedly, there exists some uncertainty whether the "not raised or passed upon" rationale for denying certiorari is jurisdictional or merely prudential. See Illinois v. Gates, 462 U.S. 213, 218-19 (1983). But even if the rationale were deemed to be merely prudential, a number of compelling policy factors identified in Webb v. Webb, supra, 451 U.S. at 499-501, compel the same result.

First, the principle of comity in our federal system dictates that state courts be afforded the initial opportunity to pass upon issues which are later urged as a basis for overturning the state courts' judgments. Moreover, only by insisting that issues be raised during the state proceedings can this Court assure that a record is developed sufficient for the issues to be addressed in a meaningful fashion later on. The "not raised or passed upon" rationale also insures that if there are independent and adequate state grounds that would pretermit the federal issues, they will be identified and ruled upon. Finally, if the parties to state court litigation are forced to present their federal claims to the state tribunals in the first instance, those issues will be adjudicated by the state courts where necessary to

dispose of the case. In many instances, such a judgment will be supported by an opinion that may well obviate any need for this Court to give plenary consideration to the issues. As this Court observed in Webb v. Webb, supra, this last factor is "a very substantive matter" in terms of managing this Court's workload. 451 U.S. at 501.

Pocono Green had ample opportunity to raise its procedural due process concerns below, but elected not to do so. Under these circumstances, it would be an affront to the Pennsylvania state courts, as well as a squandering of this Court's time on an issue which could well have been obviated if timely raised below and which in any event lacks a sufficiently developed record, to grant a writ of certiorari.

III. THERE ARE INDEPENDENT AND ADEQUATE STATE GROUNDS TO SUSTAIN THE DECISION BELOW.

"It is . . . a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds." Henry v. Mississippi, 379 U.S. 443, 446, rehearing denied, 380 U.S. 926 (1965). Specifically, where a petitioner fails to raise a due process claim until on appeal at the state court level, a state rule that such a failure waives the claim is an independent and adequate state law ground precluding review by this Court. Osborne v. Ohio, 110 S. Ct. 1691, 1703, rehearing denied, 110 S. Ct. 2905 (1990). Such a rule is applicable here, for Pa. R. App. P. 302(a) provides that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." The Pennsylvania Supreme

Court has repeatedly held that federal due process issues raised for the first time on appeal cannot be considered. Altman v. Ryan, 435 Pa. 401, 257 A.2d 583 (1969); Division 85, Amalgamated Transit Union v. Port Authority of Allegheny County, 417 Pa. 299, 208 A.2d 271 (1965) (procedural due process). It is small wonder that the Pennsylvania Supreme Court summarily denied Pocono Green's application for reargument.

A case bearing a remarkable procedural similarity to the circumstances here is In re Dorrance's Estate, 309 Pa. 151, 163 A. 303, cert. denied sub nom. Dorrance v. Commonwealth of Pennsylvania, 287 U.S. 660 (1932), reargument denied, 172 A. 900 (Pa.), cert. denied, 288 U.S. 617 (1933). In that case, the estate of a decedent challenged the Commonwealth's determination that the decedent had been

a Pennsylvania domiciliary for inheritance tax purposes. Like Pocono Green in the case at bar, the estate took its dispute up through the state court system, relying entirely on principles of Pennsylvania law. After an adverse decision by the Pennsylvania Supreme Court, the estate filed a petition for certiorari with this Court. In its petition, the estate advanced issues of due process. This Court denied certiorari because "the Federal question was not properly presented to, and was not passed upon by, the Supreme Court of Pennsylvania." 287 U.S. at 660. The estate then filed an application for reargument with the Pennsylvania Supreme Court. Reargument was denied because the estate's due process arguments had not been submitted to the court originally:

> The executors now urge that we pass on those questions . . .

> and reconsider the appeal on a theory not presented when the case was argued here. . . .
>
> At the time that this court decided the question of fact--in its judgment, a matter for decision according to the law of Pennsylvania--it was held, for the reasons stated in the opinion filed, that John T. Dorrance was domiciled in Pennsylvania. As no federal question was involved, or presented by the record or briefs or in the oral argument, for consideration in the decision of the basic matter of fact, none was considered or decided and none remains for decision.

172 A. at 900. The estate again petitioned for a writ of certiorari following the Pennsylvania Supreme Court's refusal to rehear the case, but again this Court denied the writ.

The Dorrance case illustrates a salient principle of Pennsylvania state law--i.e., that "sandbagging" will not be tolerated and that, in particular, an application for reargument which raises due process claims for the first time

will be denied. That is precisely what Pocono Green attempted to do here. The Pennsylvania Supreme Court's summary denial of Pocono Green's application for reargument thus simply reflects a well-established tenet of Pennsylvania state law. And, just as this Court denied the estate's second petition for certiorari in Dorrance, so likewise should it deny Pocono Green's petition in the case at bar.

IV. THE PETITION FAILS TO COMPLY WITH THE RULES OF THIS COURT.

Sup. Ct. R. 14.5 states that "[t]he failure of a petitioner to present with accuracy . . . whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition." The Board respectfully submits

that Pocono Green's petition fails to disclose to this Court a key fact that has a dispositive bearing on whether the issues merit certiorari: namely, that the due process question was not timely raised, and was never passed upon, below.

Pocono Green has thus violated Sup. Ct. R. 14.1(h), which requires that, if review of a state court judgment is sought, a petition for certiorari shall specify, inter alia, (1) the stage of the proceedings, both in the court of first instance and the appellate courts, where the federal questions sought to be reviewed were raised, and (2) the manner in which those issues were raised and passed upon by those courts. For obvious reasons, Pocono Green's petition is silent as to all the foregoing information.

Pocono Green's failure to obey Rule 14.1(h) is no mere academic procedural

nicety. As this Court cautioned in Webb v. Webb, supra, Rule 14.1(h) should be applied with "vigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below." 451 U.S. at 499.

V. POCONO GREEN'S PETITION MISSTATES THE LAW.

Echoing the criteria for certiorari suggested in Sup. Ct. R. 10.1(b), Pocono Green tries to whet this Court's interest by asserting that the holdings of lower courts are in chaotic disarray concerning the applicability of procedural due process to zoning proceedings. That assertion is untrue.

For example, Pocono Green cites South Gwinnett Venture v. Pruitt, 491 F.2d 5 (5th Cir.), cert. dismissed, 416

U.S. 901, cert. denied, 419 U.S. 837 (1974), for the proposition that "[t]he Fifth Circuit has concluded that all zoning board activity is legislative and, therefore, the Due Process Clause imposes no restrictions on the process utilized by the zoning board in considering an application under a zoning ordinance" (Petition for Certiorari at 11-12). By way of contrast, Pocono Green then cites Rogin v. Bensalem Township, 616 F.2d 680 (3d Cir. 1980), cert. denied, 450 U.S. 1029 (1981), in which the Third Circuit distinguished between administrative-type zoning proceedings, which are limited by procedural due process, and legislative-type proceedings, which are not. But the supposed contrast between these two rulings is illusory, for the Fifth Circuit, like the Third, has acknowledged that certain zoning decisions are circum-

scribed by procedural due process. See County Line Joint Venture v. City of Grand Prairie, 839 F.2d 1142, 1145 (5th Cir.), cert. denied, 109 S. Ct. 223 (1988) ("circumstances may arise in which the zoning decision of a governmental body . . . may require some procedural due process"). The Fifth Circuit in South Gwinnett simply held that the particular type of proceeding there (an application to amend the ordinance by rezoning a parcel of property) was legislative in nature.

To bolster its portrayal of confusion among the lower courts, Pocono Green cites the opinion in Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986). According to Pocono Green, the Eighth Circuit in Littlefield went awry in the following manner:

> There, the Eighth Circuit Court of Appeals stated that Proce-

> dural Due Process considerations were relevant, but analyzed the process by the wrong standard. After recognizing that the landowner was entitled to Procedural Due Process, the Eighth Circuit Court should have evaluated the procedural protections afforded. Instead, the Court of Appeals relied on Euclid v. Amber Realty, [272 U.S. 365 (1926)] and analyzed the decision of the zoning authority under the Substantive Due Process standard of arbitrariness and reasonableness.

(Petition for Certiorari at 12 (emphasis in original).) But, in its zeal to have a straw man to attack, Pocono Green has utterly mischaracterized the Littlefield opinion. The court there did not confuse procedural with substantive due process. Rather, the plaintiff had argued both forms of due process, and the opinion discusses each one separately. See 785 F.2d at 599-603 (discussing procedural due process); id. at 603-08 (discussing substantive due process). Furthermore, not only did the Eighth Circuit not rely

on Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), in its analysis of the procedural due process claims, but the Euclid decision is not mentioned even once in the opinion. The only confusion is on the part of Pocono Green.

In fact, the lower courts' holdings are quite harmonious. All courts that have considered whether procedural due process applies in zoning proceedings appear to agree that procedural due process applies where the proceedings are judicial or administrative in nature, and that it does not apply if the proceedings are legislative in nature. As Judge Posner explained in Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 468 (7th Cir. 1988), it is not the label applied to a zoning decision which determines whether the decision is legislative or adjudicative, but its function:

> A legislature is not allowed to circumvent the due process clause by the facile expedient of announcing that the state's courts and administrative agencies are henceforth to be deemed legislative bodies even though nothing in their powers and procedures has changed. But neither is the legislature required to judicialize zoning, and perhaps it would not be well advised to do so. The decision whether and what kind of land uses to permit does not have the form of a judicial decision. The potential criteria and considerations are too open-ended and ill-defined.

Accord Harris v. County of Riverside, 904 F.2d 497, 501-02 (9th Cir. 1990). Legislative decisions are broadly based. Because these decisions tend to affect a relatively large class of persons, the democratic constraints of electoral pressure afford the affected persons a measure of protection without the need for procedural due process. Administrative, adjudicative, or judicial decisions, on the other hand, affect far smaller groups

of individuals. Hence the need to insist upon procedural due process. Coniston Corp. v. Village of Hoffman Estates, supra, 844 F.2d at 469.

To be sure, a scrutiny of the case law in this area may well reveal some disagreement concerning whether particular zoning decisions should be classified as legislative or adjudicative in nature. However, that has not been raised as an issue in this case. Furthermore, if this Court were to take upon itself the task of classifying the myriad decisions that arise in land use regulation, from rezonings to variances to building permits, this Court would in short order find itself transformed into a super-zoning board.

Finally, even assuming arguendo that other lower court cases are in every bit as much disarray as Pocono Green would

have this Court believe, certiorari should nonetheless be denied. After all, what makes a state court decision "cert-worthy," so to speak, is not that other lower court decisions are in conflict, but rather that the state court decision for which review is sought has itself "decided a federal question in a way that conflicts" with those other decisions. Sup. Ct. R. 10.1(b). In the case at bar, the Pennsylvania Supreme Court did not decide any federal question at all, let alone one that conflicts with other lower court rulings.

VI. THE PETITION EXAGGERATES THE IMPORTANCE OF THE ISSUES. IN THE CONTEXT OF THE PRESENT CASE, THESE ISSUES ARE OF LITTLE SIGNIFICANCE TO ANYONE OTHER THAN POCONO GREEN.

Pocono Green suggests that procedural due process is needed to force zoning authorities to disclose the reasons for their decisions, thereby easing the evidentiary problem which this Court identified in Arlington Heights v. Metropolitan Housing Development Co., 429 U.S. 252, 266 (1977), as an impediment to establishing discriminatory motives for zoning decisions. This "sunshine" function of procedural due process is an intriguing notion, but one that has nothing whatsoever to do with the facts of the present case.

There was nothing furtive or secret about the Board's reasoning. As Pocono

Green has repeatedly emphasized (see Petition for Certiorari at 4), and as the record makes abundantly clear (App. at 46a-47a, Findings 22 and 23; App. at 49a), the Board expressly stated the reasons for its decision to reject Pocono Green's development plan. Pocono Green seeks to have this Court second-guess the Board not because the Board failed to articulate the basis for its decision, but simply because, in Pocono Green's view, the Board decided wrongly. See Petition for Certiorari at 2 ("[t]he [Board] reached an incorrect decision because it relied upon public opinion rather than competent evidence"). This case, in other words, does not implicate significant constitutional issues. It merely involves a disgruntled developer attempting, quite literally, to make a federal case of it.

The other two rationales offered by Pocono Green as an enticement to the grant of certiorari are equally bogus. The first rationale is that procedural due process promotes the effective administration of zoning ordinances (Petition for Certiorari at 16). But so what? This is hardly a consideration worthy of this Court's interest. Since when has the United States Constitution been reduced to an adjunct to local land control ordinances? This rationale does not add significance to the present case; it only serves to trivialize the Constitution.

Pocono Green's second rationale is that an effective national housing policy requires the uniform application of due process rights (Petition for Certiorari at 18). This argument, however, is simply a reprise of Pocono Green's earlier

false assertion that lower court holdings concerning procedural due process are in disarray.

CONCLUSION

"This case presents a garden-variety zoning dispute dressed up in the trappings of constitutional law." Coniston Corp. v. Village of Hoffman Estates, supra, 844 F.2d at 467. Not until the eleventh hour did Pocono Green conjure up the constitutional issues which it would now have this Court pass upon for the first time. The fact that Pocono Green overlooked these issues below is hardly surprising, for they have neither substance nor significance in the context of the facts of this case. It would be a waste of this Court's docket time, and an invitation to thousands of other aggrieved developers throughout the nation

to beseige this Court with certiorari petitions, if this Court were to grant Pocono Green's petition here. Certiorari should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief in Opposition to Petition for Certiorari were served upon counsel of record by posting the same in the United States mail, postage prepaid, this 14th day of December, 1990.

WILLIAM E. MCDONALD

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1990

POCONO GREEN, INC.,

Petitioner,

vs.

BOARD OF SUPERVISORS OF KIDDER
TOWNSHIP, PENNSYLVANIA,

Respondent

APPENDIX TO
BRIEF IN OPPOSITION TO PETITION
FOR CERTIORARI

TABLE OF CONTENTS

Page

Brief on Behalf of Appellant, Pocono Green, Inc., to the Court of Common Pleas A-1

Brief of Appellant, Pocono Green, Inc., to the Commonwealth Court A-62

Brief of Appellee, Pocono Green, Inc., to the Pennsylvania Supreme Court A-102

IN THE COURT OF COMMON PLEAS
OF CARBON COUNTY,
PENNSYLVANIA

POCONO GREEN, INC.,	:	NO. 85-0805 OF 1985
Appellant	:	
v.	:	CIVIL ACTION - LAW
BOARD OF SUPERVISORS OF KIDDER, TOWNSHIP,	:	
Appellee	:	ZONING APPEAL

BRIEF ON BEHALF OF
APPELLANT, POCONO GREEN, INC.

I. HISTORY AND PROCEDURAL BACKGROUND OF THE CASE

This matter is before the Court on the developer's appeal from the action of the Board of Supervisors of Kidder Township from its refusal to grant Tentative Approval for a Planned Unit Development known as "Pocono Green." The property in question, which is part of a larger tract, a portion of which is in Kidder Township and a portion of which is

in the adjoining East Side Borough, is in a district designated "R-2" under the Kidder Township Zoning Ordinance.[1]

On March 13, 1985, Pocono Green, Inc., the developer, made application to the Kidder Township authorities for Tentative Approval for a Planned Unit Development on Tannery Road.[2]

---

[1]See page 1, ¶ 2 of the Report of the Supervisors. The part of the tract in East Side Borough has been granted Tentative Approval as a Planned Unit Development which approval is not now subject to appeal. Physically this is one tract and one development through which the boundary line runs separating Kidder Township from East Side Borough.

[2]The Report of the Supervisors states that this is a request for a "Preliminary approval of a Planned Unit Development." This terminology is in error under Article VII of the Pennsylvania Munici-palities Planning Code which governs planned unit developments. The proper term is "Tentative Approval". That term is important because it gives rise to very specific different rights than a conventional "preliminary" subdivision approval under conventional zoning.

Pursuant to the application and notice on the application for a Tentative Approval, the plan was reviewed and recommended for Tentative Approval, with conditions, by the Kidder Township Planning Commission. It was also reviewed by the Carbon County Planning Commission and, with certain comments, recommended for approval.

Pursuant to appropriate public notice a public hearing was held before the Board of Supervisors of Kidder Township at the Municipal Building in Lake Harmony on April 29, 1985. At that time the Applicant (Appellant herein) appeared represented by counsel, together with its expert witnesses, and various members of the public also appeared. Applicant's counsel conducted the hearing in its behalf eliciting testimony from the witnesses and various exhibits were intro-

duced into evidence. The testimony was taken stenographically and transcribed. On June 17, 1985, the Board of Supervisors issued a written decision entitled "Report of the Supervisors Pursuant to Pennsylvania Municipalities Planning Code in the Township Zoning, Subdivision and Land Use Ordinances and the Township Comprehensive Plan" which denied the application for Tentative Approval for only one stated reason.

A timely appeal was filed to this Court in accordance with the Pennsylvania Municipalities Planning Code and the required notices of such appeal served.

It is the Appellant's position that the decision of the Board of Supervisors should be reversed and the Board be ordered to issue the Tentative Approval as requested on the grounds that

the Supervisors committed an abuse of discretion or an error of law or both.

II. ARGUMENT

A. THE SCOPE OF REVIEW OF THE COURT COURT [sic] OF COMMON PLEAS

The scope of review of the Court of Common Pleas, where no additional evidence is taken by it de novo, is to determine whether the Board of Supervisors abused their discretion or committed an error of law. Our appellate courts have defined this on a number of occasions but nowhere more cogently than in Doran Investments v. Muhlenberg Township, et al., 10 Pa. Cmwlth. 143, 309 A.2d 450, 453 (1973), where Judge Rogers writing for that Court en banc declared:

> "[1] The court below correctly determined that, not having taken additional testimony, its duty was to determine whether the board of commissioners abused their discre-

> tion or committed an error of law. Brauns v. Swarthmore Borough, 4 Pa. Cmwlth. 627, 288 A.2d 830 (1972); DeFeo v. Brookhaven Borough, 3 Pa. Cmwlth. 377, 283 A.2d 505 (1971). Ours is the same duty.
>
> Doran contends that its plan complies with all of the requirements of Ordinance No. 106 and that it is entitled to have its plan tentatively approved."

Appellant submits that in the case at bar the Board of Supervisors committed both an abuse of discretion and a positive error of law and consequently their action in denying the Tentative Approval should be reversed and an Order entered directing them to issue that Tentative Approval.

B. THE RIGHT TO OBTAIN A TENTATIVE APPROVAL FOR A PLANNED UNIT DEVELOPMENT IS DETERMINED BY THE CRITERIA SET FORTH IN THE PARTICULAR ORDINANCE PROVIDED THAT THE ORDINANCE IS CONSISTENT WITH THE ENABLING LEGISLATION.

The law in this Commonwealth is very clear with respect to the standards by which a Planned Unit Development is to be judged. The specific standards must be set forth in the ordinance and the ordinance must comply with the enabling legislation. Once an applicant demonstrates compliance with the applicable criteria (provided they are consistent with the enabling legislation) the applicant is entitled to obtain Tentative Approval. The reason for this is rooted in the evolution of zoning law in this Commonwealth and is clearly set forth in footnote 1 appearing in Doran Investments v. Muhlenberg Township, supra, where our Commonwealth Court declared:

> . . . . "The practice of case by case consideration condemned in Eves [v. Zoning Board of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960)] is overcome by the requirement that detailed development standards appear in the planned residential development ordinance and by assuming that compliance with those standards would lead to approval, subject to the additional feature, not usually present in conventional zoning, that the local planners may attach conditions conducive to the public interest. If Article VII of the MPC were to be construed to mean that a plan adhering to the standards of the ordinance may be disapproved by the governing body whenever it concludes for any reason that the plan is not in the public interest, the legislation would be identical to that struck down in Eves. Where a choice is present, courts will adopt a construction which will render legislation constitutional, not one which raises constitutional questions."

As Doran points out the question is whether or not the plans and other materials meet the applicable criteria. Those criteria must be objective

and, as will be pointed out infra, if those criteria can be met by the imposition of conditions, then it is appropriate to impose conditions and not refuse the entire Tentative Approval. Both the Supreme Court and Commonwealth Court in various cases which followed the landmark case of Village Two at New Hope, Inc. Appeals, 429 Pa. 629, 241 A.2d 81 (1968), stated that the Planned Unit Developmen [sic] is the preferred method of development.

In this case the Board of Supervisors misapplied the law and imposed an improper legal standard upon the Applicant which led directly to an improper result. It is submitted that this is reversible error. The principal ground for the refusal to grant the Tentative Approval in this case is the conclusion of law which reads as follows:

> "The evidence before the Board of Supervisors is sufficiently deficient in showing of the feasibility of the proposed sanitary waste disposal system, being a stream discharge sewage treatment plan. A proposed system which discharges into a stream which often runs dry and leads into a pond with no discharge point is detrimental to the environment, the immediate residents of the area, and all residents of Kidder Township in general."

(See pages 13-14 of the Report of the Supervisors Pursuant to Pennsylvania Municipalities Planning Code in the Township Zoning, Subdivision and Land Use Ordinances and the Township Comprehensive Plan, which is the decision from which this appeal is taken.)

The record discloses no support for this statement. The Applicant's witness, Mr. John Burke, a registered professional engineer of twenty-two years of experience, testified that he had drawn the plans and was responsible for doing

the feasibility study for this development. (N.T. 41, 45-48, 59). He further testified that providing the central sewage necessary for this development was not only feasible, in his opinion, but had been the subject of review by the Department of Environmental Resources of the Commonwealth of Pennsylvania and found by them to be feasible. Exhibit "6" in the record is a copy of a letter from the Department of Environmental Resources, Bureau of Water Quality Management dated April 1, 1985, directed to Mr. E. Kent Clark of the Kidder Township Planning Commission unequivocally stating that the preliminary plans for the distribution of sewage collection and treatment and disposal were acceptable to the Department. In pertinent part that letter reads as follows:

> "This Department has reviewed the preliminary plans

> for Pocono Green Development, located in Kidder Township and East Side Borough, Carbon County PA. The proposal submitted utilizing private water supply and distribution and for sewage collection, treatment and disposal is acceptable to the Department of Environmental Resources."

Our Commonwealth Court explored the same issue as presented by the case at bar on a prior occasion and came to precisely the opposite conclusion as that to which the Board of Supervisors came in this case and so decided the issue as a matter of law. In In Re Appeal of Molnar, 64 Pa. Cmwlth. 518, 441 A.2d 487, 490, 491 (1982), the Court held that the Borough Council's denial of a Tentative Approval on the basis that it did not accept the applicant's architect and hydraulic engineer's testimony as to the adequacy of proposal for storm water sewers and drainage was improper. While the opinion of the Court does not so re-

flect, one of the considerations in that case was the uninformed opinion of some lay protestants. The Court made clear that there was no evidence to contradict this assertion by the applicant as to adequacy and further that only the FEASIBILITY of the proposal only [sic] was at issue at this stage in the proceeding. The Court there said:

> "The Borough Council objected finally to the alleged insufficiency of the developer's plans for abatement or containment of the presently existing serious storm water drainage problem at the site, arguing that this situation would be severely exacerbated by the proposed development. The developer proposed to deal with the problem by means of a twenty-five year interval storm drainage basin or pond coupled with a rerouting of the stream which runs through the area. The dimension of the basin represented an increase in size from that set forth in the original plan. The architect, basing his opinion upon the studies and earlier testimony of Dr. John Verna, a hydraulic engineer, testified to the ade-

quacy of the proposal. Several weeks prior to the hearing, the proposal and studies done by Dr. Verna had been made available to the Borough's planner and engineer but neither was called to testify or responded at the hearing. There is, therefore, nothing in the record to support the Borough Councils' finding of the inadequacy of the storm drainage plan. However, as noted by the Borough Council, the area downstream from the site is subject to flooding and an increase or ill-chosen alteration in flow of the stream would seriously affect downstream properties. Although the Borough cannot burden the developer with responsibility for alleviation of an existing problem, Michaels, it can require the developer to adopt appropriate storm control measures to protect the community against further aggravation of the problem as a result of construction of the PURD. At this stage of the proceedings, however, the developer is required only to disclose the feasibility of proposals for the disposition of storm water, Section 707(4)(v) of the MPC, 53 P.S. §10707(4)(v); specifications as to the precise projected relocation of the stream are to be included in his application for final approval. Section 711(a) of the MPC, 53 P.S. §10711(a). (Emphasis sup-

plied.)

In the prior Molnar case captioned Municipality of Bethel Park Appeal, 51 Pa. Cmwlth. 128, 414 A.2d 401 (1980), the Court indicated that where doubt existed as to whether or not a particular criteria could be complied with, it was necessary to consider whether or not a conditional approval was not more appropriate than an outright refusal. The Court did this by including virtually its entire order in the prior Molnar case in its opinion in the second case. Thus, in this situation we come face to face with the proposition that the Board of Supervisors here not only erred, but could have perhaps cured their error by granting a Tentative Approval and conditioning the same upon compliance with the applicable Department of Environmental [sic] standards. They chose not to

do that, again we suspect, inter alia, because it is a political body and chose to satisfy its voting constituents.

The holding in Molnar, supra, is in no way diminished or limited by Rees v. Board of Supervisors of Indiana Township, ___ Pa. ___, 513 A.2d 584 (1986). In that case the opinion was directed to the approval of a stipulation which had been entered into between an Applicant-Developer and the Township as to a proposed planned residential development approval. There had been a series of findings by the Board of Supervisors of Indiana Township refusing a Tentative Approval almost all of which the court inferentially found totally without merit. One finding dealt with the adequacy of flow of a creek into which the sanitary sewer outfall was to run. The Municipality found that it was

"not acceptable" because of that. The Court there did not rule upon the question of whether or not such a refusal was, in fact, valid but rather held that it was the only issue in the case that could be the subject of review. A reading of the Record in that case clearly shows that the Court never reached the issue, but merely decided that since that objection was no longer part of the case (of the numerous ones made) there was no need to even reach the issue.

In Rees, supra, the matter was settled by interim negotiations between the Township and the applicant. The intervenor objected to the stipulation and it was that objection which the Court dismissed. In Rees the Court said that all of the other objections to the PRD (that the local sewer authority objected, that it was not in harmony with the com-

prehensive plan, that it would create traffic problems at the particular intersection, that it violated other zoning provisions not applicable to PRDs, that the interior road network was not adequate or safe) were invalid as objections. The Record and the paper books show that the Court never reached the question as to whether, under the facts in Rees, the sewage question was properly decided. Somewhat inartfully, perhaps, the Court there was saying that it was the only objection to be reviewed by the Court, but it was not necessary to do the same because of the settlement. Additionally there the Applicant-Developer had access to public sewers and for some reason was originally unwilling to hook into them. (See Rees Record, p.260a.)

The Kidder Township Planned Unit Development Ordinance itself con-

tains no criteria with respect to sewage except that any residential development must be "attached to a centralized water supply system and a centralized sewage disposal system." There being no specific criteria in the Ordinance against which such "feasibility" must be measured, the standards then applicable are those that are imposed by the Commonwealth of Pennsylvania, Department of Environmental Resources, which is the governmental authority charged with the duty of regulating permits, overseeing construction, operation and maintenance of such facilities.[3] In this case, the

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[3]There is no question about the Commonwealth's paramount interest in control-ling sewage plants and discharge points. All plans must be approved by the Department of Environmental Resources, but to operate without a permit subjects the operator to the exposure of significant penalties. The Act of October 10, 1980, P.L. 894, No. 157, §1, 35 P.S. 691.207 (pocket parts) states:

Department having made an uncontradicted and unrebutted statement as to the feasi-

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> "§691.207. Approval of plans, designs, and relevant data by the department
>
> All plans, designs, and relevant data for the construction of any new sewer system, or for the extension of any existing sewer system, by a municipality, or for the erection, construction, and location of any treatment works or intercepting sewers by a person or municipality, shall be submitted to the department for its approval before the same are constructed or erected or acquired. Any such construction or erection which has not been approved by the department by written permit, or any treatment works not operated or maintained in accordance with the rules and regulations of the department, is hereby also declared to be a nuisance and abatable as herein provided.

Section 202 of the same Act (35 P.S. 691.202) subjects all sewage disposal into the waters of the Commonwealth to the continuing jurisdiction of the Department of Environmental Resources. Absent other objective criteria, these (and these alone) govern this and all other applications.

bility of the proposal for both water distribution and sewage collection, that determination of the Department should control. In addition, however, there was the testimony of Mr. John Burke, a registered professional engineer, who did the preliminary design which was submitted to the Department of Environmental Resources, who testified that in his opinion, the system was feasible. There was no evidence whatsoever that this was not the fact.

The Board of Supervisors, however, misconstrued two lay people who were in the audience (and whom one could perhaps characterize as opponents) who testified that there was an insufficient amount of water in the stream into which the sewage disposal plant would be discharging the treated effluent. Testimony was given to a Mr. Les Herling and it

appears at pages, N.T. 64-65.[4] The second witness was a Mr. Richard Beam, who brought forward a Mr. Brady who lived approximately a mile downstream from the point at which this effluent would enter the stream and who also was concerned that the stream might periodically go dry. They were not experts and were not even qualified observers. Mr. Brady was also concerned that the children who skate on the ice on the pond at his property (approximately a mile away) might eat some of the ice which he feared might be contaminated. (See N.T. 68-71). Needless to say that it is the responsibility of the Department of Environmental Resources to see to it that

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[4]Not to be confused with the next witness Mr. Chris Herling who was more concerned with whether the developer had any plans to make a donation to the volunteer fire company of Kidder Township of which he was a part.

the sewage disposal plant is designed and built to be safe. It is regularly inspected and tested by them to prevent any malfunction. However, Mr. Beam and Mr. Brady's "petition" with seventy-nine names on it obviously weighed more with the Board of Supervisors than the facts and law.[5]

The Report of the Board of Supervisors on its face indicates that this is the only basis on which the Board of Supervisors refused the tentative application. On closer reading, however, it is possible that there are certain other matters which went into their deliberations and may have influenced the decision to deny the Tentative Approval. Whether or not these are make-weights or not is impossible to determine from their Report. Having addressed what appears to

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[5]See N.T. 68 and Township Exhibit 1.

be the overriding reason and, it is submitted, having amply demonstrated that the Supervisors improperly denied the application for Tentative Approval for the stated reason, the Appellant developer will show that the other factors are equally without merit.

C. THE PENNSYLVANIA MUNICIPALITIES PLANNING CODE REQUIRES THAT THE ORDINANCE SET FORTH ALL STANDARDS, CONDITIONS AND REGULATIONS UNDER WHICH THE APPLICATION FOR A PUD IS TO BE JUDGED.

The legislature in writing the PUD provisions of the Code was mindful of the Supreme Court's opinion in Eves v. Zoning Board of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960), which had disapproved "flexible" "selective" zoning. The import of that decision was that, in order to remain constitutional, zoning ordinances were required to have pre-announced, objective criteria so that the

owners of land would know what was, and was not, permitted. This found expression in the requirement in §705 (53 P.S. 10705) which states:

> "Section 705. Standards and Conditions for Planned Residential Development. -- Every ordinance adopted pursuant to the provisions of this article shall set forth all the standards, conditions and regulations by which a proposed planned residential development shall be evaluated, and said standards, conditions and regulations shall be consistent with the following provisions:
>
> (a) The ordinance adopted pursuant to this article shall set forth the uses permitted in a planned residential development, which uses may include and shall be limited to:
>
> (1) Dwelling units in detached, semi-detached, attached or multi-storied structures, or any combination thereof; and
>
> (2) those nonresidential uses deemed to be appropriate for incorporation in the design of the planned residential development. The ordinance may establish regulations setting forth the timing of

development among the various types of dwellings and may specify whether some or all nonresidential uses are to be built before, after or at the same time as the residential uses.

(b) The ordinance adopted pursuant to this article shall establish standards governing the density, or intensity of land use, in a planned residential development. The standards may vary the density or intensity of land use, otherwise applicable to the land under the provisions of a zoning ordinance of the municipality within the planned residential development in consideration of:

(1) The amount, location and proposed use of common open space;

(2) The location, and physical characteristics of the site of the proposed planned residential development; and

(3) The location, design, type and use of structures proposed."

Where the Ordinance does not supply such "standards, conditions and regulations" it can only be taken to mean

that there are none or that those under other governmental jurisdiction apply.

In the case at bar, the Ordinance does not set forth standards, conditions or regulations for water supply, sewage disposal, storm water, soil erosion control or the financial viability of the private companies which operate the water and sanitary sewage companies. This is altogether appropriate because the Commonwealth has pre-emptive, all embracing regulatory mechanisms for the licensure, planning, construction and operation of sewer plants as discussed infra. It has similar controls for water (25 Pa. Code 109.1, et seq.) and for soil erosion control (25 Pa. Code §102.2). Rates and economics are governed by the Public Utility Commission. No other body or party has jurisdiction of such matters.

The feasibility of water and sanitary sewer supply to the proposed development was amply demonstrated by the engineering testimony and the Department of Environmental Resources letter in the Record. Erosion control mechanisms such as plans and permits are done when FINAL APPROVALS are sought for construction, not at the time of TENTATIVE APPROVAL. Before any building permits can be issued, an application must be made to the Department, plans must be submitted and approved. The relevant portion of the Pennsylvania Code (25 Pa. Code 102.42 and 102.43) are:

> "§102.42. Notification of application for building permits.
>
> Any local governing body which issues building permits shall notify the Department or its designee immediately upon receipt of an application for a building permit involving an earth-moving activity which

affects five acres or more of land."

"§102.43. Withholding building permits.

A local governing body shall not issue a building permit to those engaged in earthmoving activities requiring a Department permit until the Department has issued the permit pursuant to §§102.41 -- 102.42 of this title (relating to responsibilities of local governing bodies)."

Clearly these cannot legally be grounds for refusal, if indeed they are, since the only applicable "standards, conditions and regulations" have been met or will be met when the appropriate time comes.

D. IN THIS CASE THE BOARD OF SUPERVISORS COMMITTED REVERSIBLE ERROR WHEN THEY APPLIED STANDARDS NOT MANDATED BY THE ENABLING LEGISLATION AND THEIR OWN ORDINANCE.

The Pennsylvania Municipalities Planning Code (Pa.MPC) 53 PCA 10101 et

seq. is the governing framework for all zoning, subdivision and planning within the Commonwealth of Pennsylvania. This enabling legislation does exactly what the term "enabling" means. It enables political subdivisions in the Commonwealth to enact zoning, subdivision and planning ordinances, IF, AND ONLY IF, THEY COMPLY WITH BOTH THE SUBSTANTIVE AND PROCEDURAL SAFEGUARDS SET FORTH IN THE CODE. For example, in Abel v. Middletown Township, 7 Pa. Cmwlth. 6, 297 A.2d 525 (1972), the Township of Middletown attempted to impose by ordinance an additional procedural step which was not expressly provided for in the Pa.MPC. In that case the Township of Middletown required a "sketch" plan to be submitted prior to a request for a Tentative Approval for a planned residential development or a planned unit residential devel-

opment. Our Commonwealth Court held that the municipality was not at liberty to change the procedural steps set forth in the Code. It is not obligatory that every municipality have a planned unit development or planned unit residential development district or that it make provision for that kind of development, Kauffman and Broad, Inc. v. Board of Supervisors of West Whiteland Township, 20 Pa. Cmwlth. 116, 340 A.2d 909, 376 A.2d 305 (1975). If, however, it elects to avail itself of those provisions, then it must comply with the standards set forth in the enabling act, Abel, supra.

The Municipalities Planning Code sets forth quite particularly the kind of information which the applicant developer must submit and it limits what the Ordinance may require. The relevant provisions are contained in §707 and read

as follows:

> "Section 707. Application for Tentative Approval of Planned Residential Development. --In order to provide an expeditious method for processing a development plan for a planned residential development under the terms of an ordinance adopted pursuant to the powers granted herein, and to avoid the delay and uncertainty which would arise if it were necessary to secure approval, by a municipality of local procedures, of a plat of subdivision as well as approval of a change in the zoning regulations otherwise applicable to the property, it is hereby declared to be in the public interest that all procedures with respect to the approval or disapproval of a development plan for a planned residential development and the continuing administration thereof shall be consistent with the following provisions:
>
> * * *
>
> (4) <u>The ordinance shall require only</u> such information in the application as is reasonably necessary to disclose to the governing body or its designated agency: (i) the location, size and topography of the site and the nature of the landowner's interest in the

land proposed to be developed; (ii) the density of land use to be allocated to parts of the site to be developed; (iii) the location and size of the common open space and the form of organization proposed to own and maintained [sic] the common open space; (iv) the use and the approximate height, bulk and location of buildings and other structures; (v) the feasibility of proposals for the disposition of sanitary waste and storm water; (vi) the substance of covenants, grants of easements or other restrictions proposed to be imposed upon the use of the land, buildings and structures including proposed easements or grants for public utilities; (vii) the provisions for parking of vehicles and the location and width of proposed streets and public ways; (viii) the required modifications in the municipal land use regulations otherwise applicable to the subject property; (viii.1) the feasibility of proposals for energy conservation and the effective utilization of renewable energy sources; and (ix) in the case of development plans which call for development over a period of years, a schedule showing the proposed times within which applications for final approval of all sections of the planned residential development are intended

> to be filed and this schedule must be updated annually, on the anniversary of its approval, until the development is completed and accepted; (As amended 1982 P.L. 613, No. 173.)" (Emphasis supplied)

In its reports the Supervisors admitted that all of the requirements of §707 were met except for three. Paragraph 4 of the Findings of Fact at pages 3 and 4 list in detail all of the material required by the Pennsylvania Municipalities Planning Code and admit that the application contained all of the information required. In paragraph 5 of the Findings the Board of Supervisors mentioned three which, they assert, were required by the Municipalities Planning Code but which were not included. These were:

(a) the height of the buildings proposed,[6]

(b) feasibility proposals for energy conservation and effective utilization of renewable energy sources, and

(c) the required modification of municipal land use regulations.

Appellant vigorously disputes all of these.

The plans and sketches submitted to the Board of Supervisors in the

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[6]The Findings of Fact are clearly contradictory because in Finding of Fact number 19, the Board of Supervisors found that all height requirements of the zoning ordinance will be met. Finding of Fact number 19 (at page 9) reads as follows:

> "19. The developer has shown clustered housing and all height requirements of the zoning ordinance will be met. There appears adequate light and air in proper building spacing."

application clearly shows [sic] the height of the buildings as being within the permissible limits. In addition, Finding of Fact number 19 (p.9) admits that the height limitation has been met.

As to the feasibility proposals for energy conservation and effective utilization of renewable energy resources, since the enactment of the Ordinance the Pa.MPC there has been legislation mandating energy conservation measures.[7]

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[7]By Federal regulation, the developer is required to disclose to any buyer in the sales agreement the R valve, type and the thickness of insulation installed in each part of the house. 16 CFR Ch. 1 §460.16 (1-1-86 Ed.). Further, this development is served by Pennsylvania Power and Light (PP&L) which is one of the companies in the Federal Residential Energy Conservation Program providing for energy audits and means of conservation for the Residential Conservation [of Energy] Service. See 10 CFR Ch. 11 §456 et seq. and particularly Subpart E, §456.501 et seq. PPL has an outstanding record in this regard.

As to the required modification of municipal land use regulations, the Board of Supervisors admitted in its Finding of Fact number 5 that evidence of this was produced at the public hearing.

The fact that there were departures from the conventional Township zoning ordinances has no bearing on the approval of a Planned Unit Development or a Planned Residential Development. It cannot be the basis for a refusal. This was the subject of a significant comment by our Commonwealth Court in Michaels Development Company, Inc. v. Benzinger Township Board of Supervisors, 50 Pa. Cmwlth. 281, 413 A.2d 743, 747 (1980), where that Court held that it is the very essence of a Planned Unit Development that it depart from conventional lot-by-lot standards. It there said:

> "Departures from the township zoning ordinance have no

> significant bearing on the approval of the PRD application. A PRD application is not to be judged by the standards of the township zoning ordinance, for "[i]t is the very essence of a planned residential development that it may diverge from zoning requirements." Doran, supra, 10 Pa.Cmwlth. at 155, 309 A.2d at 457. Instead, a PRD must meet the requirements of the particular Ordinance. Here, all have agreed that the Developer has so complied."

Therefore this statement, if it was part of the basis of the refusal is without merit.

In its Finding of Fact number 11A the Supervisors misconstrued their own zoning Ordinance. That Finding reads as follows:

> "11. The Plan documents depart from the Kidder Township Subdivision and Land Development Ordinance (1971) and the Kidder Township Zoning Ordinance provisions (other than Article 4, Subsection 4.403 Use Class 14 - Planned Unit Development) as follows:
>
> A. The rear set back requirement of thirty (30')

> feet as [sic] not been met. The Plan must show sufficient rear set back from the property lines as to not adversely effect [sic] adjacent property owners. This requirement would be a condition of any tentative preliminary plan approval;"

The Supervisors were apparently under the impression that they could incorporate by reference the rear setback requirement of the conventional zoning ordinance which would require rear yards of a minimum of thirty feet. No such requirement appears in their Planned Unit Development ordinance. Under Michaels, supra, the conventional zoning ordinance is not relevant to the Planned Unit Development type of ordinance unless it is specifically set forth as a standard as required by §705 of the Pennsylvania Municipalities Planning Code. We have searched the entire Ordinance and have been unable to find any rear yard requirement for a PUD development. If the refusal is, in part,

bottomed on this premise it is also fatally defective as a matter of law.

The Supervisors found that the plan provided adequately for pedestrian and vehicular safety except for a portion of the entrance to the development. There the Supervisors criticized the plan on two grounds. The first was the adequacy of ingress and egress in Finding 11C which states:

> "C. The Plan depicting a main cul-de-sac roadway violates the provisions for cul-de-sac streets under the Kidder Township Subdivision and Land Development Ordinance. We find this to create a serious problem for ingress and egress to the within development in the event it is blocked at any given point. In the instance of fire or other emergency, this situation could create a serious danger to life and property and thus would not be in the public interest. Any plan to be given tentative approval would have to provide an alternative roadway system for vehicular traffic other than the main roadway ending in a cul-de-sac as shown on the

present Plan."

The Supervisors [sic] comments in paragraph 11C relates [sic] to ingress and egress and their finding that the road system created a "serious problem." They go on to equate this to a danger to life and property because there is no "alternate roadway." While this has a certain amount of surface appeal, the problem with this Finding is that it is JUST NOT A FACT. The Supervisors here either did not understand the testimony and the drawings or they were looking for a reason to deny the application.

This parcel of ground is irregular. It is almost bisected by the line between East Side Borough and Kidder Township. The East Side Borough portion which as been granted a PUD tentative approval pursuant to East Side's Ordinance shows the means of ingress and

egress through Kidder Township. It is obvious that because of the various constraints, a Planned Unit Development of the site is the most rational approach since a conventional "cookie cutter" kind of subdivision would obviously destroy much of the attractiveness of the tract."[8] A conventional approach would compel the destruction of almost all of the trees on the site.

No responsible developer today would attempt to foist off a plan that was unsafe or presented a danger to life or property, and that was not done here. The consulting engineer came up with an extremely ingenious and practical way of meeting the problem of a long, narrow

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[8]This was assumed by the Township's planning consultant as can be deduced from her letter of April 26, 1985 which is part of the Record as Exhibit 7. She found it "consistent with the comprehensive plan" of 1968.

tract by creating <u>two</u> (not one as the Board wanted to--and did--find) all-weather paved means of ingress and egress in the event of any emergency.[9] Mr.

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[9]There are actually three means of ingress and egress in the event of an emergency, two are paved and one is not. This problem arose in the East Side Borough application for Tentative Approval and was reviewed by the Carbon County Planning Commission for them and found to be quite acceptable. Under date of September 17, 1985 Mr. Bruce Conrad said in a letter to East Side Borough:

<u>NEW CONDITIONS</u>

> It was the opinion of this Commission that the boulevard entrance way, with the secondary loop system, would provide adequate secondary access within this subdivision for emergency purposes. If the Kidder Township portion is not going to be developed at this time, some sort of secondary emergency access way must be developed from the end of the boulevard entrance way to the beginning of the secondary loop system in East Side Borough. The Subdivider has indicated a willingness to do so. This would not have to be a paved surface since the probability of its ever being used is extremely

James S. Carr, a registered architect in twenty-two states, a partner in a major architectural and planning firm with some fifteen years of experience, who was responsible for the design, so testified.[10] Mr. John A. Burke, the consulting engineer, also testified about the dual system. By making a boulevard of the entrance, dividing the entrance by a raised, curbed, green-planted medial strip, two roads are created. Each lane is 11' wide with a 9' stabilized shoulder, a total of 20 feet. The medial is 10' wide. Normally the lanes would be one way. If one lane was blocked and the shoulder could not be used, however, the

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small."

This letter is not of Record in this case, but is part of the East Side Borough Record.

[10]See N.T. 25-26 for his credentials and authority; N.T. 32 as to the dual system and an explanation on p.36-37.

alternate would be to use the other lane on the other side of the boulevard or the other shoulder.[11] This was designed so that there could be no "choke point" at the entrance without paved alternatives as well as the shoulders.

Once beyond the boulevard, resort must be had to the plan (Applicant's Exhibit 8) to understand how simple and effective the system is in reality and how it solves the problem. The planned road system provides both normal and alternate emergency ingress and egress to and from every dwelling in the PUD by two (2) separate routes. The main thoroughfare through the development is a 22-foot wide paved, limited-access roadway, with a 9-foot shoulder on each side, for a total improved width of forty (40) feet. This thoroughfare is the primary traffic

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[11]See N.T. 43; 56-57.

route, providing efficient and uninterrupted access to all parts of the development. In addition to the main thoroughfare, the plan provides for a series of loop roads through the parking areas which serve the dwelling clusters. All of the loop roadways are located so that any obstruction in either the main thoroughfare or any of the loops (such as a stalled vehicle) can be bypassed by swinging through a well defined bypass, through and out the other side. Attached hereto as Appendix "A" and incorporated herein is a copy of the April 18, 1985 Plan (Applicant's Exhibit 9), which illustrates the flow of the primary and secondary road systems. (The markings have been superinposed [sic] on the Exhibit for ease of exposition.) The entire development is served by these two parallel all-weather paved routes which

the plans amply demonstrated and the testimony reinforced. Thus, at least two means of ingress and egress which are all-weather are provided. Any finding to the contrary just is not supported by the Record.

As part of the Carbon County Planning Commission's review of the proposed Pocono Green PUD, its Director, Bruce Conrad, and Deputy Director, Eugene Butler, made an on-site inspection of the subject tract for the purpose of determining whether the tract and the planned PUD provided safe and adequate access. Their findings are set forth in a report which was submitted to Kidder Township and the Township Planning Commission as part of their sketch plan review. That report was not contained in the record certified to the Court by the Township in this matter, but is part of the files of

the Carbon County Planning Commission, Kidder Township and the Kidder Township Planning Commission regarding the proposed Pocono Green PUD. A true and correct copy of that official communication is attached hereto as Appendix "B" and incorporated herein. That report, at pages 3 and 4 thereof, states as follows:

> "It was the primary intention of this site inspection to determine if the proposed access could be reasonably expected to be able to be kept open in an unforeseen emergency. And, if not, if there could be ad hoc emergency access from another direction if it were closed for any reason.
>
> "We concluded, from our on-site inspection, that the secondary circulation system proposed within the Subdivision would be adequate to keep access open in the event that the throughroad would be blocked for any reason. Therefore, any potential severance of access could only occur in the approximate 400 linear foot entrance road across the Pocono Hershey Golf Course. This area is not steeply sloping, does not contain any water courses

> and is immediately adjacent to a Pennsylvania Department of Transportation storage depot. It is highly unlikely that this road would ever be severed except by possible drifting snow about which seasonal precautions could be taken.
>
> We also noted that both in the area of the access road and in the area at the end of the cul-de-sac, there were cartroads on the Pocono Hershey Golf Course over which an ambulance could travel in an extreme emergency. It is clear, however, that this same alternate would not work for fire trucks. It was also clear from conversations we had with management at Pocono Hershey that, in the once in a hundred year possibility of the Subdivision's main road being blocked, they would not block such access in a true emergency."

The Board of Supervisors commented about what they misperceived as a problem and "threw it into the pot," so to speak. It is submitted that it has no place in their consideration. The proposed roadway separates two portions of the Pocono Hershey Resort Golf Course and

its patrons shortcut (trespass) over this area driving golf carts across what is proposed to be the main roadway. The problem with the Supervisors [sic] finding on this subject is that the Township apparently seeks to impose upon the Applicant here the duty of preventing a hazard which is caused by the trespassing of others. The Applicant established early on in the proceedings its right to fee title to the premises. That was part of its burden under §107(12) of the Pa.MPC. This it accomplished by both testimony and exhibits which the Board admits. In Finding of Fact number 2 it concedes that Pocono Green, Inc. was the equitable owner of all the land shown on the development plan and the landowner as defined by the Code. Nowhere on this record was any adverse interest established despite the fact that a repre-

sentative of Pocono Hershey Resort Golf Course (guests and business visitors of theirs being the offending parties) was at the hearing and testified. (See Finding of Fact 9A.) The landowner should not suffer having his plan for development refused because of the action of others who trespass upon his land now. While the Supervisors may wish to have some assurance that protective measures will be taken to prevent accidents, they cannot refuse to permit development on grounds that others (who have no interest in the land) are playing fast and loose with the developer's property. Even if this was a conventional development of a standard subdivision, the rights to create an entry road and subdivide the parcel could not be refused on grounds that trespassers might be injured if the development was permitted.

To the same extent the gratuitous comment in Finding of Fact number 16 that the recreation area is far removed from Kidder Township and the inference that the Supervisors would require compliance with the open space and density requirements would be necessary before Tentative Approval was granted is in error.[12] The Supervisors own Finding

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[12]The two findings are:

> "12. The Kidder Township Zoning Ordinance, as amended, Article 4, Basic District Regulations: Section 4.300 Use Classes and Zoning Districts, Use Class 14 Planned Unit Development would apply in the present case. The P.U.D. meets the requirements of maximum land coverage by building of 20%, being 11.7% in this P.U.D. and land coverage by all development of 30%, being 27.4% in this P.U.D. The public recreation area requirement is three hundred (300) square feet per house unit and the development meets this requirement by providing three hundred fifty nine (359) square feet per dwelling unit."

number 12 admits that all of the open space and density requirements have been met.

The Supervisors also took exception to what they infer is the inadequacy of storm drainage plans and storm

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"16. The purpose of common open space is to provide for separation of various clusters of houses, visual enjoyment, separation for circulation of air and light, a sense of privacy and to preserve as much of the natural terrain and tree growth as possible. The common open space also serves the purpose as a site for certain active recreational uses. We find that the recreational area located in Kidder Township but not adjacent to the development to be minimumly adequate to meet the recreational and common open space needs of development located in Kidder Township. The "Recreation Area C" as shown on the preliminary plan is far removed from Kidder Township. The common open space requirement of twenty-five (25%) percent for each residential district (common open space as defined by the Zoning Ordinance) has been met in Kidder Township."

water erosion noting that complete erosion and sediment control plans would be required as a condition of any Tentative Approval. They noted that there was no certification by the Applicant's engineer that the surface and subsurface conditions would not cause damage to property or life and, while not expressly so stating, inferred that this was a reason for disapproval. The problem with those Findings are [sic] no such certifications are required. The only thing that is required is that the developer demonstrate the "feasibility of proposals for the disposition of storm water" under §707(4)(v) of the Pennsylvania Municipalities Planning Code. The uncontradicted and unrebutted testimony of Mr. Burke, the engineer, established that the storm drainage plans and the erosion and sedimentation controls would not cause any

danger and are feasible (N.T. 44, 45).

Finally, soil erosion and storm sewers are gone into in great detail at the time when FINAL APPROVAL IS SOUGHT, NOT AT THE TENTATIVE STAGE. The plans for handling storm sewage were submitted at the time of the original application. The Kidder Township Planning Commission had an opportunity to review them, as did the Carbon County Planning Commission. Presumably the Township engineer had an opportunity to review them. No question was raised as to the feasibility of those proposals. No document was submitted which in any way indicates that the proposals are not feasible. No witness questioned the feasibility of the proposal for storm water. There is no requirement for soil and erosion control plans in either the Kidder Township Planned Unit Development Ordinance nor [sic]

in the Pennsylvania Municipalities Planning Code. There are overriding soil and erosion controls enforced by the Department of Environmental Resources which must be met and which are generally covered by an application process to that Department and supervision by them which obviously the developer will have to comply with at that time.[13] They are not, however, relevant or material at the Tentative Approval stage of the proceeding.

The Board of Supervisors also erred in Finding of Fact number 20 which states that the plan showed a general commercial area and the developer Applicant failed to advise the Township of the specific uses that would be made of that area. The Developer is not required

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[13]See §711 of the Pa.MPC, 53 P.S. 10711 for the second step of the two-step procedure required by the Enabling Act.

to state what specific uses will be made of a building at the tentative stage. The uses are controlled by the township zoning ordinance and the developer cannot predict which one of the number of uses permitted will show up as a prospective user, tenant or purchaser. It is only after permits are granted or the buildings are erected that this question can be resolved. Obviously nothing can be done in the commercial area, in terms of use, which does not meet the terms of the zoning ordinance.

Finding of Fact number 22 deals with the sewage question which has been the subject of this Brief, supra. The Finding by the Supervisors as to whether the stream runs dry or not is totally gratuitous and not based upon the evidence.

In Findings of Fact numbers 25 and 26 the Township again stepped outside of the authority vested in it and attempted to invest itself with the authority which has been granted to the Public Utility Commission of the Commonwealth. The Township here raised concerns as to what might happen and how it might apportion the cost in the event the public utility company which operates the plant "becomes defunct or is unable to properly operate the sewage treatment plant and system." The Public Utility Commission of the Commonwealth has sole jurisdiction over the rights and manner in which public utilities operate. Springdale Twp. v. Allegheny County, 76 Pa. Cmwlth. 305, 463 A.2d 1257 (1983); Morrow v. Bell Telephone Co. of Pa., 330 Pa. Super. 276, 479 A.2d 548 (1984), 66 P.S. 501. The Municipality has a right to be repre-

sented at any hearings held by the Public Utility Commission and to make requests of them, but it is in the sole discretion of the Public Utility Commission to grant, deny or condition such request.

The same is true of Finding of Fact number 26 regarding the water system. The water system is solely within the scope of competence of the Department of Environmental Resources, which has indicated its approval of the proposed system at the current stage of the approvals process.

Finally, the Board of Supervisors refused the Tentative Approval on only one ground and that was the feasibility of the proposed sanitary waste disposal system. As hereto indicated, this matter was substantially put to rest by reason of the uncontradicted and unrebutted testimony of Mr. John Burke and

the letter from the Department of Environmental Resources indicating the feasibility of the proposed system. There was no contrary evidence whatsoever. It is also interesting to note in this connection that the Township engineer, who forwarded a number of comments (Township Exhibit "4") (but did not testify), did not question the feasibility of the sanitary sewer system.

III. SUMMARY

For all of the foregoing reasons the Appellant moves the Court to reverse the decision of the Board of Supervisors of Kidder Township and to order the granting of Tentative Approval

for the planned unit development known as Pocono Green.

Respectfully submitted,

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IN THE
COMMONWEALTH COURT OF
PENNSYLVANIA

NO. 1549 C.D. 1987

POCONO GREEN, INC.,

Appellant

v.

BOARD OF SUPERVISORS
OF KIDDER TOWNSHIP
(CARBON COUNTY),

Appellee

BRIEF OF APPELLANT, POCONO GREEN, INC., APPLICANT BELOW

Appeal from the Order
dated June 19, 1987,
of the Court of Common Pleas
of Carbon County
No. 85-0805

Filed:

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	i [A-65]
STATEMENT OF JURISDICTION . .	1 [A-67]
ORDER APPEALED FROM	2 [A-68]
STATEMENT OF QUESTION INVOLVED	3 [A-69]
STATEMENT OF THE CASE	4 [A-71]
SUMMARY OF ARGUMENT	7 [A-76]
ARGUMENT FOR APPELLANT	9 [A-79]
A. The Scope of Review . .	9 [A-79]
B. The Right to Obtain a Tentative Approval for a Planned Unit Development is Determined by the Criteria Set Forth in the Particular Ordinance Provided That the Ordinance is Consistent With the Enabling Legislation . .	11 [A-82]
CONCLUSIONS AND RELIEF SOUGHT.	21 [A-98]

. . . .

TABLE OF CONTENTS [sic]

Cases	Page
Abel v. Township of Middletown, 7 Pa. Comwlth. 6, 297 A.2d 525 (1972)	11 [A-82]
Brauns v. Swarthmore Borough, 4 Pa. Comwlth. 627, 288 A.2d 830 (1972)	9 [A-79]
Commonwealth v. Stanley, 498 Pa. 326, 446 A.2d 583 (1982)	13 [A-86]
De Foe v. Brookhaven Borough, 3 Pa. Comwlth. 377, 283 A.2d 505 (1971)	9 [A-79]
Doran Investments v. Muhlenberg Township, et al., 10 Pa. Comwlth. 143, 309 A.2d 450 (1973)	9, 11 [A-79, A-82]
In Re Appeal of Molner, 64 Pa. Comwlth. 515, 414 A.2d 487 (1982). . . .	13-15, 18 [A-86, A-87, A-88, A-96]
Lily Penn Foods v. Pennsylvania Milk Marketing Board, 80 Pa. Comwlth. 266, 472 A.2d 715 (1984)	9-10 [A80, A-81]

TABLE OF CONTENTS [sic]

Cases — Page

Rees v. Board of Supervisors of Indiana Township, ___ Pa. Comwlth. ___, 513 A.2d 584 (1986) 17-18
[A-92, A-93, A-94, A-95]

Snelling v. Department of Transportation, 27 Pa. Comwlth. 276, 366 A.ed 1298 (1976). 10
[A-80]

Statutes and Ordinances

Pennsylvania Municipalities Planning Code 5, 11-13
[A-5, A-83, A-84, A-85]

Kidder Township Zoning Ordinance 4
[A-71]

Other Authorities

Webster's Ninth New Collegiate Dictionary (Copyright, 1986) 20
[A-97]

Webster's Unabridged Second Edition (Copyright, 1983) 20
[A-97]

I. STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Section 762 of the Judicial Code, Act of July 9, 1976, P.L. 586, No. 142, as amended, 42 Pa. C.S.A. Section 762.

II. ORDER APPEALED FROM

AND NOW, this 19th day of June 1987, it is hereby ORDERED AND DECREED that the Appeal of Pocono Green, Inc. is DENIED and the Decision of the Board of Supervisors of Kidder Township, denying tentative approval to a Planned Unit Development, is AFFIRMED.

Costs on Appellants.

III. STATEMENT OF QUESTION INVOLVED

In a zoning case where the refusal of an application for tentative approval of a Planned Unit Development turns upon a question of the "feasibility" of a sanitary sewage system which has been professionally designed and has met with preliminary approval of the Department of Environmental Resources and where the ordinance contains no other standard or criteria is it not an abuse of discretion to deny the Tentative Approval when the only evidence to the contrary is that of two protestant, lay witnesses to the effect that the stream into which the system was to discharge periodically runs dry? (Such testimony is irrelevant since stream flow is frequently not required.) Under these circumstances, has the Board of Supervisors not capriciously disregarded the competent

evidence and thus committed an abuse of discretion in disregarding the the [sic] written preliminary approval of the Department empowered to pass upon such matters and the testimony of Applicant's engineer in favor of irrelevant statements by two interested lay witnesses?

Answered in the negative by the Court below.

IV. STATEMENT OF THE CASE

This matter is before the Court on the developer's appeal from the decision of the Court of Common Pleas of Carbon County (per President Judge Lavelle) affirming the action of the Board of Supervisors of Kidder Township in refusing to grant Tentative Approval for a Planned Unit Development known as "Pocono Green." The property in question, a portion of which is in Kidder Township and a portion of which is in the adjoining East Side Borough, is in a district designated "R-2" under the Kidder Township Zoning Ordinance.[14] The part of the tract in East Side Borough has been granted Tentative Approval as a Planned Unit Development which approval is not now subject to appeal. Physically this is one tract and

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[14]See page 1, ¶2 (R 10a.) of the Report of the Supervisors.

one development through which runs the boundary line separating Kidder Township from East Side Borough. The East Side Borough tract is landlocked so that the only means of ingress and egress is through Kidder Township.

On March 13, 1985, Pocono Green, Inc., the developer, made application to the Kidder Township authorities for Tentative approval for a Planned Unit Development on Tannery Road.[15]

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[15]The Report of the Supervisors states that this is a request for a "Preliminary approval of a Planned Unit Development." (R10a.)

This terminology is in error under Article VII of the Pennsylvania Municipalities Planning Code which governs planned unit developments. The proper term is "Tentative Approval". That term is important because it gives rise to very specific and different rights in the planned residential sections of the Pennsylvania Municipalities Planning Code quite different than a conventional "preliminary" subdivision approval under conventional zoning.

Pursuant to the application and notice on the application for a Tentative Approval, the plan was reviewed and recommended for Tentative Approval, with conditions, by the Kidder Township Planning Commission. It was also reviewed by the Carbon County Planning Commission and, with certain comments, recommended for approval.

A public hearing was held before the Board of Supervisors of Kidder Township at the Municipal Building in Lake Harmony on April 29, 1985. At that time the Applicant (Appellant herein) appeared represented by counsel, together with its expert witnesses, and various members of the public also appeared. Applicant's counsel conducted the hearing in its behalf eliciting testimony from the witnesses and various exhibits were introduced into evidence. The testimony

was taken stenographically and transcribed. (R. 31a. - 134a.). On June 17, 1985, the Board of Supervisors issued a written decision entitled "Report of the Supervisors Pursuant to Pennsylvania Municipalities Planning Code in the Township Zoning, Subdivision and Land Use Ordinances and the Township Comprehensive Plan" (R10a. - 23a.) which denied the application for Tentative Approval for only one stated reason which was that the application had failed to prove the "feasibility" of its proposed sewage disposal system. (R22a. - 23a.)

A timely appeal was filed to the Court of Common Pleas. (R135a.) That Court heard the matter on argument without taking additional evidence and affirmed the action of the Board of Supervisors in denying the application for Tentative Approval.

It is the Applicant's position that the decision of the Court below and the Board of Supervisors should be reversed and the Board be ordered to issue the Tentative Approval as requested on the grounds that the Supervisors committed an abuse of discretion or an error of law or both.

V. SUMMARY OF ARGUMENT

This is a zoning case in which the Board of Supervisors of Kidder Township refused an application for Tentative Approval of a Planned Unit Development based on its Finding that the "evidence before the Board is sufficiently deficient in showing the feasibility of the proposed sanitary sewer system."[16] This Finding of Fact which led directly to a conclusion of law that the Applicant had not met its burden of proof, is a classic case of abuse of the Board of Supervisors [sic] discretion in that it was a capricious disregard of the competent evidence which led directly to an error of law.

The uncontradicted evidence of Record adduced by the Applicant's profes-

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[16]The Board of Supervisors apparently abandoned any other makeweight objections before the Court of Common Pleas and only briefed and argued this one.

sional engineer (who did the preliminary design) showed that the Department of Environmental Resources (the agency charged by law with the power to approve or disapprove) had given preliminary written approval of the feasibility of the system. The only contrary evidence was testimony of two lay protestants who asserted that the stream into which the system was to discharge periodically ran dry. This protestant "evidence" is irrelevant because the state of the art now in sewage disposal systems is such that the effluent outfall can be made as clean or cleaner than the incoming water in a potable water system. In any event, it is the Department of Environmental Resources' criteria and judgment which govern here since the ordinance in question has no objective standards of its own.

Hence, the Board of Supervisors committed an abuse of discretion in denying Applicant Tentative Approval and the lower court erred in sustaining the Board's action.

The decision should be reversed and the Board directed to issue the Tentative Approval as requested, at most with a caveat or condition that the Applicant's developer comply with all of the Department of Environmental Resources regulations.

VI. ARGUMENT FOR APPELLANT

A. THE SCOPE OF REVIEW

The scope of review of the Courts, where no additional evidence is taken de novo, is to determine whether the Board of Supervisors abused their discretion or committed an error of law. This was most cogently stated in Doran Investments v. Muhlenberg Township, et al., 10 Pa. Cmwlth. 143, 309 A.2d 450, 453 (1973), where Judge Rogers, writing for this Court en banc, declared:

> "[1] The court below correctly determined that, not having taken additional testimony, its duty was to determine whether the board of commissioners abused their discretion or committed an error of law. Brauns v. Swarthmore Borough, 4 Pa. Cmwlth. 627, 288 A.2d 830 (1972); Defeo v. Brookhaven Borough, 3 Pa. Cmwlth. 377, 283 A.2d 505 (1971). Ours is the same duty.
>
> Doran contends that its plan complies with all of the requirements of Ordinance No. 106 and that it is entitled to

> have its plan tentatively approved."

An abuse of discretion is defined as basing a conclusion upon wholly arbitrary grounds in capricious disregard of competent evidence. It was succinctly put by this Court in Lily Penn Food v. Pennsylvania Milk Marketing Board, 80 Pa. Comwlth. 266, 472 A.2d 715, 718, 719 (1984) where the majority of the court en banc, speaking through Judge Craig, declared:

> "We may only review the discretionary acts of public officials upon a showing of fraud, bad faith, capricious action, or abuse of discretion, Snelling v. Department of Transportation, 27 Pa. Commonwealth Ct. 276, 286, 366 A.2d 1298, 1304 (1976); we have applied that standard to board decisions in the past, Lily Penn II, 68 Pa. Commonwealth Ct. at 605, 437 A.2d at 490; Lily Penn I, 42 Pa. Commonwealth Ct. at 97, 400 A.2d at 663-64. To constitute an abuse of discretion, the board must have based its conclusion upon wholly arbitrary grounds, in capricious dis-

> regard of competent evidence. Lily Penn I, 42 Pa. Commonwealth Ct. at 97, 400 A.2d at 664. Here, the board abused its discretion by a capricious disregard of the only material cost evidence pertinent to the issue of lower minimum prices for lowfat and skim milk.

Appellant submits that in the case at bar the Board of Supervisors committed an abuse of discretion in capriciously disregaring [sic] the only competent evidence and consequently their action in denying the Tentative Approval should be reversed and an Order entered directing them to issue the Tentative Approval for which the application was made.

B. THE RIGHT TO OBTAIN A TENTATIVE APPROVAL FOR A PLANNED UNIT DEVELOPMENT IS DETERMINED BY THE CRITERIA SET FORTH IN THE PARTICULAR ORDINANCE PROVIDED THAT THE ORDINANCE IS CONSISTENT WITH THE ENABLING LEGISLATION.

The law in this Commonwealth is very clear with respect to the standards by which a Planned Unit Development is to be judged. The applicant must show that the plan complies with the specific criteria set forth in the Planned Unit Development Ordinance. The ordinance in turn must comply with the enabling legislation. Once an applicant demonstrates compliance with the applicable criteria (provided they are consistent with the enabling legislation) the applicant is entitled to obtain Tentative Approval. Doran Investments, supra; Abel v. Township of Middletown, 7 Pa. Comwlth. 6, 297 A.2d 525 (1972).

The criteria in the ordinance must be objective and, as will be pointed out infra, if those criteria can be met by the imposition of conditions, then this Court has said it is appropriate to impose conditions and not refuse to grant the Tentative Approval.

In this case the Applicant met or exceeded all of the criteria set forth in Article VII Pennsylvania Municipalities Planning Code (Pa MPC)53 PCA 10701, et seq. and Use Class 14 of the Kidder Township Zoning Ordinance which is the Planned Unit Development Section except, the Township alleges, subparagraph i, which reads as follows:

> i. No residential use of the type herein specified shall be allowed unless said Planned Unit Development is attached to a centralized sewage disposal system before inhabitation of any portion of the development.

There are no definitions in the ordinance of the word "centralized." There are no standards in the ordinance governing "centralized" sewage systems. The word "feasible" is not used in the ordinance. The above quoted section is the ONLY reference to sewage disposal in Planned Unit Developments in the Kidder Township Ordinance.

The ONLY place the term "feasible" is used is in Section 707(4) of the PaMPC (53 PCA 10707(4)), which places limitations upon the contents of an application for Tentative Approval of a Planned Residential Development which can be imposed on an applicant. That section, in pertinent part reads:

> (4) The ordinance shall require only such information in the application as is reasonably necessary to disclose to the governing body or its designated agency: (i) the location, size and topography . . .; (ii) the location and

> size of the common open space . . .; (iv) the use and the approximate height, bulk and location of buildings . . .; (v) the feasibility of proposals for the disposition of sanitary waste and storm water; (vi) the substance of covenants, grants of easements or other restrictions . . .; (vii) the provisions for parking of vehicles proposed streets and public ways; (viii) the required modifications in the municipal land use regulations . . .; (viii.1) the feasibility of proposals for energy conservation . . .; (ix) in the case of development plans which call for development over a period of years, a schedule . . . . (Emphasis supplied).

The Board's abuse of discretion turned precisely on this issue. The lower court said that there were no definitions of the term "feasible" in the Act or in any Pennsylvania case.[17]

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[17]The lower court's opinion reads, in part, "The threshold issue here is the meaning of the term "feasibility" as that term is contemplated in the Act. Our independent research has reveased [sic] that neither the Act nor any Pennsylvania appellate case law provide a definition of that term to guide us. We are, there-

We submit this is incorrect because guidance was supplied by this Court in In Re Appeal of Molnar 64 Pa. Comwlth. 515, 441 A.2d 487, 480 [sic], 491 (1982) which was cited and quoted by the Applicant in its Brief to the lower court. (Applicant's Lower Court Brief pp. 7, 8 and 9). In that case this Court at pp 480[sic]-491 of 441 A.2d said:

> The Borough Council objected finally to the alleged insufficiency of the developer's

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fore, guided by the polestar principle that, where a statutory term is not defined, we must look to the common and approved usage of that term. 1 Pa.C.S.A. Sec. 1903; Commonwealth v. Stanely [sic], 498 Pa. 326, 446 A.2d 583 (1982).

Black's Law Dictionary defines the term feasible, the root of feasibility, as "[c]apable of being done, executed, or affected or accomplished. Reasonable assurance of success." BLACK'S LAW DICTONARY, p. 549 (Fifth Edition, 1979). Feasible is also defined, inter alia, as "[c]apable of being utilized or dealt with successfully; suitable." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, p. 480 (1971). (Opinion of June 19, 1987 at p. 5)

plans for abatement or containment of the presently existing serious storm water drainage problem at the site, arguing that this situation would be severely exacerbated by the proposed development. The developer proposed to deal with the problem by means of a twenty-five year interval storm drainage basin or pond coupled with a rerouting of the stream which runs through the area. The dimension of the basin represented an increase in size from that set forth in the original plan. the [sic] architect, basing his opinion upon the studies and earlier testimony of Dr. John Verna, a hydraulic engineer, testified to the adequacy of the proposal. Several weeks prior to the hearing the proposal and studies done by Dr. Verna had been made available to the Borough's planner and engineer but neither was called to testify or responded at the hearing. There is, therefore, nothing in the record to support the Borough Council's findings of the inadequacy of the storm drainage plan. However, as noted by the Borough Council, the area downstream from the site is subject to flooding and an increase or ill-chosen alteration in flow of the stream would seriously affect downstream properties. Although the Borough cannot burden the devel-

> oper with responsibility, for alleviation of an existing problem, Michaels, it can require the developer to adopt appropriate storm control measures to protect the community against further aggravation of the problem as a result of construction of the PURD. At this stage of the proceedings, however, the developer is required only to disclose the feasibility of proposals for the disposition of storm water, Section 707(4)(v) of the MPC, 53 P.S. Section 10707(4)(v); specifications as to the precise projected relocation of the stream are to be included in his application for final approval. Section 711(a) of the MPC, 53 P.S. Section 10711(a).

Molnar, in many ways is identical to the case sub judice. There the expert testimony of the Applicant's engineer and architect was rejected in favor of unfounded fears of lay witnesses as to storm drainage. (Counsel here was counsel there). This court held such reliance to be an abuse of discretion.

The Board of Supervisor's decision turned upon their rejection of the Applicant's engineer's testimony (Mr. Burke) that the proposed sewage treatment system was feasible and their adoption of the testimony of two lay protestants that the outflow of the sewage plant went into a stream which had little water in it and sometimes went dry. Mr. Burke was apparently unaware of this "fact". Mr. Burke had testified that the proposed sewage plant was feasible, that he had submitted preliminary plans for it to the Department of Environmental Resources and, that they had preliminarily approved those plans. Entered in evidence as Exhibit 6 (R26a. - 30a.) was a letter from the Department of Environmental Resources. The DER letter reads, in pertinent part as follows:

> This Department has reviewed the preliminary plans for

> Pocono Green Development, located in Kidder Township and East Side Borough, Carbon County PA. The proposal submitted utilizing private water supply and distribution and for sewage collection, treatment and disposal is acceptable to the Department of Environmental Resources. (R26a.)

The error is that, even assuming that the Board of Supervisors is correct in believing the two lay witnesses (Messrs. Les Herling and Brady) that the stream runs dry, THIS DOES NOT IMPEACH OR CONTRADICT THE DEPARTMENT OF ENVIRONMENTAL RESOURCES' REVIEW OR THE ENGINEER, MR [sic] BURKE'S TESTIMONY. Today, the technology of these well designed sewage plants is such that the waste water coming out of them is of better quality than ordinary rain water runoff and stream water. The Board's opinion leaves one with the impression (based on the observation of two lay protestants) that the discharge will cause a fetid mess in this

stream. The Board jumps to this conclusion without giving any credence to the fact that it is the DER's standards which govern here. The Township has none except those quoted above. In fact, the DER had reviewed the Applicant's plans and had stated that Applicant's proposed sewage treatment plant is acceptable to them and this preliminary approval has been given no credence by the Board.

The error in the Supervisor's Findings is the implied assumption that, just because there is a low flow (if there is), there is no technology to obviate the problem. That is a totally unwarranted assumption both as a matter of law and fact. As a matter of law, the Board is in error because the jurisdiction to make findings regarding the feasibility of a sewage treatment system absent the enactment of their own stand-

ards, is legally vested in the DER.

As a matter of law, Judge Lavelle of the lower court bottomed his opinion upon Rees v. Board of Supervisors of Indiana Township, ___ Pa. Comwlth. ___, 513 A.2d 584 (1986) which reliance, it is submitted, is in error. The facts in Rees are simply inapposit [sic]. There the Board of Supervisors refused an application for Tentative Approval of a Planned Development for a number of reasons which the Court found to be inadequate reasons for denial. In Rees, there was testimony from residents that the creek into which the sewage system discharged flowed only "intermittently" during the summer months. Between the time of Refusal and the disposition of the case, the developer in Rees entered into an agreement to use the Township's sewage system and a settlement on that

basis was approved by the lower court. The settlement agreement was attacked by the objecting parties, its validity was upheld by the lower court and affirmed by this Court.

The principal differences between Rees and this case are at once obvious. First, all that this Court said there was that evidence of the possible discharge of effluent into a stream which flows only intermittently RAISED A QUESTION of the feasibility of the proposed on-site system. Secondly, there was NO Departmental approval in Rees. This is a very critical difference. The Rees court pointedly said that it was not called upon to decide whether or not this would be sufficient grounds to sustain a denial or would merit remand to consider other

appropriate alternatives.[18]

Secondly, and most important, in Rees there was no showing of preliminary approval of the system by the Department of Environmental Resources as there is here. This is a most important fact because the expertise of the Depart-

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[18]The quote from Rees, supra at p. 102 and 103 of 39 D&C 3rd used by the Court reads more fully as follows:

> "We agree with the board that testimony from residents indicating that the creek into which appellant planned to discharge effluents flows only intermittently during the summer months raised a question as to the feasibility of the proposed private on-site sewage disposal system. However, appellant has agreed to use of the township's public sanitation system rather than the proposed private system. We therefore need not decide whether possible problems with the adequacy of the private system would be grounds to sustain the denial of the application or would instead merit remand to the board to consider other appropriate alternatives." (Emphasis added.)

ment can hardly be denied and, if it should be in error, there is always a right of appeal from its decision. The record of Rees, lodged with this Court, is absolutely silent on the question of DER approval. In the case sub judice, extensive efforts were made to insure that the system would be feasible by seeking the advice of the Department charged with the oversight of such matters and obtaining their opinion in writing that the system would pass muster. That opinion and the DER's preliminary approval are in documentary form, before this Board of Supervisors, as it had been before the Board of Supervisors (Commissioners) of East Side Borough which had approved this system and found it "feasible".

It is also important to note that the technology of these sewage

systems has advanced to the point where it has been demonstrated that the system can be so constructed that effuent [sic] leaving the plant is drinkable (potable).

As against this highly probative evidence the Board in this case decided that, as a matter of law, the statements of two lay persons as to the status of the flow in the stream was sufficient to establish the lack of feasibility of a system which did not necessarily depend upon stream flow. These statements stood in stark contrast against a showing by a registered professional engineer who designed the system and the Department of Environmental Resources that it was feasible. This is in conflict with the directions of this court in Molnar, supra.

It is submitted that such a finding based upon such meager un-

qualified testimony could not sustain a conclusion that the Applicant developer did not sustain its burden of proof with respect to the feasibility of the proposed sewage system.[19]

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[19]The Court's attention is called to the definition of "feasible" which is as follows:

> **fea'si·ble,** a. [Ofr faisable, that may be done, from faire, to make, do.] 1. that may be done, performed, executed, or effected; practicable, possible. 2. likely, reasonable, probably; as a feasible story. 3. that may be used or dealt with successfully; as, land feasible for cultivation.

Webster's Unabridged Second Edition p. 669, Copyright 1983.

> **fea·si·ble** \fe·ze·bel\ adj. [ME faisble, fr., MF, fr. fais - stem of faire to make, do, fr. L. facere -- more at DO] (15(c) 1: capable of being done or carried out <a plan> 2: capable of being used or dealt with successfully: SUITABLE 3: REASONABLE, LIKELY syn see possible.

Webster's Ninth New Collegiate Dictionary p. 453 (1983) copyright 1986.

VII. CONCLUSIONS AND RELIEF SOUGHT

In this case, the record clearly establishes that the only reason for the Board's refusing the Tentative Approval here requested was its conclusion that statements by two uninformed lay witnesses that the stream occasionally ran dry were sufficient to overcome the evidence of preliminary approval of Applicant's proposed sewage treatment system by the Department of Environmental Resources, the agency of the Commonwealth charged with determining these facts, and a qualified professional engineer. Reliance upon such statements, without more, to form the basis for a vital Finding of Fact which leads to a determinative Conclusion of Law was an abuse of discretion on the part of the Board of Supervisors of Kidder Township and is not supportable upon review. This is not

simply a matter of the Board weighing credibility of testimony of equally qualified witnesses, but rather of its relying on witnesses who merely testified to a fact which, in lay terms may raise an inference, but is insufficient to rebut head on the official action of the agency charged with the responsibility of administering such matters.

Accordingly, the Order of the lower court should be reversed, and the Board of Supervisors of Kidder Township should be directed to issue the Tentative Approval requested, perhaps with the caveat that all regulations of the De-

partment of Environmental Resources be complied with.

Respectfully submitted,

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SUPREME COURT OF
PENNSYLVANIA EASTERN
DISTRICT

POCONO GREEN, INC.,	:	No. 3 E.D. Appeal
Appellee,	:	Docket 1989
-against-	:	
BOARD OF SUPERVISORS OF KIDDER TOWNSHIP (CARBON COUNTY),	:	
Appellant.	:	

BRIEF OF APPELLEE
POCONO GREEN, INC.

Appeal from the Order of the
Commonwealth Court, Docket
Number 1549 C.D. 1987

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CONTENTS

TABLE OF CASES . . . . . ii [A-104]

SUMMARY OF ARGUMENT . . . . . 1 [A-107]

COUNTER-STATEMENT OF THE CASE . . . . . 4 [A-111]

ARGUMENT . . . . . 12 [A-126]

I. BECAUSE KIDDER TOWNSHIP HAS COMPLETELY DEFERRED TO STATE STANDARDS ON SEWAGE TREATMENT, D.E.R. APPROVAL OF POCONO GREEN'S PRELIMINARY PLANS ESTABLISHES COMPLIANCE WITH TOWNSHIP REQUIREMENTS . 13 [A-127]

II. THE SUPERVISORS' STATED REASONS FOR DENYING TENTATIVE APPROVAL ARE LEGALLY DEFICIENT . . . 20 [A-140]

A. The Board's Factual Findings are Legally Insufficient to Support its Decision . 21 [A-140]

B. The Board of Supervisors Failed to Provide Specific Objections to Pocono Green's Plan . . . 24 [A-140]

C. The State's Requirement of Obtaining Final D.E.R. Approval Fully Protects The Public Interest . . 26 [A-149]

CONTENTS CONTINUED

III. THE SUPERVISOR'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE . . . . . 29 [A-154]

CONCLUSION . . . . . 31 [A-158]

TABLE OF CASES

Akin v. South Middleton Township Zoning Hearing Board, 547 A.2d 883 (Pa. Commw. 1988) . . . . . 18 [A-136]

Coretsky v. Board of Supervisors of Butler Township, No. 88 W.D. 1987, ___ Pa. ___, 1989 Westlaw 17244 (March 3, 1989). . . . . 18 [A-136]

Council of the Borough of Baldwin v. Nernburg, 71 Pa. Commw. 642, 455 A.2d 773 (1983) . . . . . 20, 25 [A-139, A-148]

Council of Middletown Township v. Benham, 514 Pa. 176, 523 A.2d 311 (1986) . . . . . 13, 16, 19, 24 [A-127, A-133, A-138, A-145]

Doran Investments v. Muhlenberg Township Board of Commissioners, 10 Pa. Commw. 143, 309 A.2d 450 (1973) . . . . . 19, 25, 26 [A-137, A-148, A-150]

Eckert v. Pierotti, 553 A.2d 114 (Pa. Commw. 1989) . . . . . 16 [A-133]

Hakim v. Board of Commissioners of O'Hara Township, 19 Pa. Commw. 661, 339 A.2d 905 (1975) . . . . . 26 [A-149]

Lawner v. Engelbach, 433 Pa. 311, 249 A.2d 295 (1969) . . . . 12 [A-126]

Michaels Development Co. v. Benzinger Township Board of Supervisors, 50 Pa. Commw. 281, 413 A.2d 743 (1980) . . . . . 18, 21, 22, 29, 31 [A-136, A-141, A-142, A-154, A-157]

Mitchell Energy Corp. v. Zoning Hearing Board, 108 Pa. Commw. 113, 529 A.2d 585 (1987) . . . . . 18 [A-136]

Montgomery Township v. Franchise Realty Interstate Corp., 54 Pa. Commw. 535, 422 A.2d 897 (1980) . . . . . 18 [A-136]

Pocono Green, Inc. v. Board of Supervisors of Kidder Township, 117 Pa. Commw. 396, 543 A.2d 1253 (1988) . . . . . 1, 11-12, 31 [A-107, A-123, A-124, A-125, A-126, A-158]

Pomona Hill Associates, Ltd. v. East Bradford Township, 24 Chest. 319 (1976) . . . 19, 26 [A-138, A-150]

Rees v. Board of Supervisors of Indiana Township, 99 Pa. Commw. 452, 513 A.2d 584 (1986) . . . . . 27 [A-151]

Stein v. Easttown Township Board of Supervisors, 110 Pa. Commw. 293, 532 A.2d 906 (1987) . . . . . 27 [A-150]

Stewart v. Zoning Hearing Board of Radnor Township, 110 Pa. Commw. 111, 531 A.2d 1180 (1987) . . . . . 16 [A-133]

Township of Plymouth v. County of Montgomery, 550 A.2d 1033 (Pa. Commw. 1988) . . . . . 28 [A-153]

Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983) . . . . . 29 [A-154]

SUPREME COURT OF
PENNSYLVANIA EASTERN
DISTRICT

POCONO GREEN, INC.,	:	No. 3 E.D. Appeal Docket 1989
Appellee,	:	
-against-	:	
BOARD OF SUPERVISORS OF KIDDER TOWNSHIP (CARBON COUNTY),	:	
Appellant.	:	

BRIEF OF APPELLEE
POCONO GREEN, INC.

SUMMARY OF ARGUMENT

The Commonwealth Court correctly held that the Kidder Township Board of Supervisors "committed an error of law" and "abused its discretion" in denying Pocono Green, Inc.'s application for tentative approval of a planned residential development. Pocono Green, Inc. v. Board of Supervisors of Kidder Township, 117

Pa. Commw. 396, 543 A.2d 1253, 1254 (1988). Pocono Green complied with the only requirements in the Township's ordinances with regard to provisions for sewage treatment in an application for tentative approval of a PRD: (1) Pocono Green's preliminary plan provides for the construction of a sewage treatment plant to serve the entire development (App. 138, 149; see Zoning Ord. § 4.403 (Use Class 14(i)), App. 36); and (2) the Pennsylvania Department of Environmental Resources has determined that Pocono Green's "proposal . . . for sewage collection, treatment and disposal is acceptable to [D.E.R.]." (App. 155; see Subd. Ord. § 3.304(k)(2), App. 99). Despite Pocono Green's compliance with all applicable Township regulations, the Supervisors concluded that Pocono Green's plans for sewage treatment are not fea-

sible,[20] purportedly on the ground that the proposed sewage treatment plant will discharge treated effluent "into a stream which runs dry and leads into a pond that does not discharge . . . except in flooding." (App. 170)

The Commonwealth Court correctly ruled that tentative approval should be granted. First, under settled law, a local governing body cannot deny tentative approval to a PRD plan by relying on standards not contained in its ordinances.

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[20]The Supervisors now state that they "concur[ ] with the Common Pleas and Commonwealth Courts' definition of the term 'feasibility.'" (Brief p. 7) But in their Petition for Allowance of Appeal to this Court, the only general legal question that the Supervisors raised was that "the standard of feasibility under . . . [53 P.S. § 10707] has never been addressed by" this Court. (Petition p. 3) By abandoning without explanation this purported basis for their appeal, the Supervisors raise a serious doubt about their good faith in invoking the Court's discretionary jurisdiction.

Second, D.E.R.'s comprehensive, statewide regulations explicitly provide that a sewage treatment plant can discharge effluent into a stream that runs dry, and D.E.R. imposes no separate standards based on whether the stream flows into a pond or how such a pond drains. Furthermore, the Supervisors did not even explain why it is unsafe to discharge treated effluent into a stream that runs dry or a stream that flows into a pond that discharges by "flooding." Nor did the Supervisors explain why the state-imposed requirement of final D.E.R. approval is inadequate to protect the public interest. The Township has no regulations restricting use of the proposed receiving stream on the grounds advanced by the Supervisors, and any attempt to enact such Township regulations would be preempted by the applicable

D.E.R. regulations.

Finally, the Supervisors' finding of nonfeasibility is incompatible with D.E.R.'s classification of the receiving stream as a "high quality cold water fishery." 25 Pa. Code § 93.9 (List D), p. 93-28. D.E.R. requires that treated effluent discharged into such a stream must meet D.E.R.'s most stringent criteria for effluent quality. See id. § 93.7, pp. 93-13, 14; § 93.7(e). Because D.E.R. has certified, pursuant to those criteria, that Pocono Green's sewage treatment proposal "is acceptable to [D.E.R.]" (App. 155), the Supervisors' finding of nonfeasibility is erroneous as a matter of law.

COUNTER-STATEMENT OF THE CASE

Four years ago, on March 13, 1985, Pocono Green, Inc., a corporation

organized under the laws of Pennsylvania, submitted an application for approval of a preliminary plan for a planned residential development ("PRD") to the Planning Commission of Kidder Township, Carbon County. (App. 137)[21] The proposed development, "Pocono Green," is to be situated on a partially wooded tract of 88.769 acres adjacent to the Pocono Hershey Resort golf course. Approximately 51 acres of the tract are Kidder Township, and the rest of the tract is in East Side Borough.[22] (App. 142-52)

The application to Kidder Township contains various information that an

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[21]An appendix ("App.") submitted with Pocono Green's brief contains materials from the record before the Board of Supervisors.

[22]The portion of the development located in East Side Borough was the subject of a separate application. East Side Borough has granted tentative approval.

applicant for approval of a PRD must submit under Section 707 of the Pennsylvania Municipalities Planning Code ("MPC"), 53 P.S. § 10707, and Kidder Township's Zoning Ordinance ("the Zoning Ordinance") and Subdivision and Land Development Ordinance ("the Subdivision Ordinance") -- including, relevant to this appeal, Pocono Green's "Report on Sewage and Water Facilities." (App. 138) That report explains that because there are no available municipal central sewage treatment facilities, Pocono Green will have its own. The facility will use the "extended air process" method of treatment, and will discharge "final treated effluent . . . to an unnamed tributary of the Lehigh River . . . located at 41°-03'-00" N latitude and 75°-45'-00" W longitude." (App. 139-40) The report also summarizes D.E.R. standards for the

release of effluent into that stream, and further states that those standards "are within the capability" of the proposed sewage treatment system. (App. 140)

On the basis of the application and supporting materials submitted by Pocono Green, the Township Planning Commission issued a report and recommendation to the Board of Supervisors, as required by section 3.202(d) of the Subdivision Ordinance. (App. 92-93) The Planning Commission recommended that the application be "given tentative approval." A condition of the Commission's recommendation was that Pocono Green "provide . . . Pennsylvania D.E.R. approvals for sewage and water systems" to the Board of Supervisors. (App. 160)

Section 3.304(k)(2) of the Subdivision Ordinance provides: "When the subdivision is to be served by a private

central sewage disposal system, the developer shall submit two copies of a letter from [D.E.R.] which states that the system meets the State of Pennsylvania's minimum requirements." (App. 99) Other than this requirement of D.E.R. approval, the Township's ordinances do not list any additional standards that a preliminary subdivision plan must meet with regard to the feasibility of plans for central sewage treatment and disposal.

On April 29, 1985, the Board of Supervisors of Kidder Township held a public hearing on Pocono Green's application. At the hearing, Pocono Green presented its preliminary plan, which included, in accordance with section 3.304(k)(2) of the Subdivision Ordinance, a letter dated April 1, 1985 from the D.E.R. Bureau of Water Quality Management to the Planning Commission. (App.

153-56) In that letter, D.E.R. stated that it had reviewed Pocono Green's preliminary sewage and water plans and found them acceptable:

> This Department has reviewed the preliminary plans for Pocono Green development, located in Kidder Township and East Side Borough, Carbon County, Pa. The proposal submitted utilizing private water supply and distribution and for sewage collection, treatment and disposal is acceptable to the Department of Environmental Resources.

(App. 155) (emphasis added)

Three witnesses for Pocono Green, Inc. appeared at the hearing. James S. Rothstein, a practicing attorney from Berks County and the President of Pocono Green, Inc., gave an overview of the development and discussed the anticipated market for it. (Hearing 8-24, 97-102) James S. Carr, who is a partner in a major national architecture and land planning firm and prepared the prelimi-

nary plan, discussed various design and land use aspects of the plan. (Id. 25-40, 93-96) John A. Burke, a registered professional engineer from Luzerne County, discussed the technical aspects of the preliminary plan: road construction, storm water drainage, soil conditions, water supply, fire protection, and facilities for sewage treatment and disposal. (Id. 41-86)

Concerning sewage treatment, Burke stated that D.E.R. had informed Pocono Green, Inc. of the D.E.R. requirements for discharging treated sewage effluent into the proposed receiving stream at Pocono Green. Burke further explained that, taking the D.E.R. requirements into account, Pocono Green's sewage treatment plans "are feasible from an engineering standpoint." Burke referred the Supervisors to the April 1, 1985 letter from

D.E.R., and he explained that Pocono Green had submitted it to the Supervisors in "response to the requirements of the subdivision and land planning regulations of the Township which require an opinion in writing from [D.E.R.] that the proposed methods of . . . sewage disposal are . . . proper." (Id. 45-47)

Two Township residents raised concerns at the hearing about the ability of the receiving stream to absorb the treated effluent. They stated that the stream sometimes runs dry and that it flows into a pond that drains "only when you have a flood." (Id. 64, 70) Also, a group of residents presented a signed "protest against Pocono Green Developers dumping sewage from their proposed plant into what is called Shantyhouse Creek, or Slaughterhouse Creek." (App. 157; Hearing 68)

In response, Burke acknowledged that "[t]here ha[d] been some discussion at . . . Planning Commission meetings concerning the ability of that stream to absorb the discharge." He noted, however, that D.E.R. had informed Pocono Green that the D.E.R. criteria take "high water flow" and "low water flow" conditions into account, and that Pocono Green will have to meet those criteria in order to obtain a final permit. He also pointed out that the stream runs "almost a mile" from the proposed effluent discharge point to the pond, and that "there is a good deal of renovation that occurs in that distance." Burke explained further that if the stream runs dry, D.E.R. may take that into account in setting standards for the effluent that can be discharged into the stream. Finally, Burke assured those present at the hear-

ing that in order to obtain final approval from D.E.R. for a sewage treatment plant, Pocono Green will need "to demonstrate that the receiving stream will be able to handle the flow . . . in high water and low water times." (Id. 47-49, 59, 70)

Only one other witness testified -- the golf professional from the Hershey Pocono resort, who was called by the Township to testify about the flow of traffic across Pocono Green between two sections of the golf course. (Id. 86-93) The Township did not call any expert witnesses to testify about the preliminary plan's provisions for sewage treatment. Nor did the Township's attorney cross-examine Mr. Burke about the D.E.R. letter submitted by Pocono Green.

On July 17, 1985 the "Report of

the Supervisors pursuant to Pennsylvania Municipalities Planning Code and the Township Zoning, Subdivision and Land Use Ordinances" was issued. (App. 161) The Supervisors' report states that Pocono Green's application for preliminary approval of a planned unit development contains, as required by the MPC, 53 P.S. § 1071 et seq., "[i]nformation on the feasibility of proposals for the disposition of sanitary waste." (App. 163) The report also states that as required by article 4 of the Township Zoning Ordinance, the application includes plans for a centralized sewage disposal system. (App. 169) The Supervisors did not, however, report that the application includes, as required by the Subdivision Ordinance, "a letter from [D.E.R.] which states that the system meets the State of Pennsylvania's minimum requirements."

Subd. Ord. § 3.304(k)(2) (App. 99).

The report states that at the hearing before the Supervisors, "[s]tatements . . . were made by residents in the area" that the stream designated to receive the treated effluent "runs dry and leads into a pond that . . . does not discharge except in flooding." Without citing any evidence other than these statements by two residents at the hearing, the Supervisors concluded "that the feasibility of the proposal for the disposition of sanitary waste has not been shown by the developer." (App. 169-70)

The Supervisors made absolutely no findings as to why, if the proposed receiving stream runs dry and flows into a pond that discharges by flooding, Pocono Green's proposed sewage treatment system will not be able to operate safely and effectively under these conditions.

Moreover, the Supervisors did not even mention the letter submitted to them in which D.E.R. stated that it had determined that Pocono Green's "proposal . . . for sewage collection, treatment and disposal is acceptable to the Department of Environmental Resources." (App. 155) Nor did the Supervisors address the comprehensive D.E.R. regulations that establish specific standards for the quality of treated sewage effluent that may be discharged into each body of water in Pennsylvania. Nevertheless, the Supervisors denied tentative approval on the sole basis of "a lack of showing of feasibility of the proposed sanitary waste system." (App. 174)

On July 16, 1985, Pocono Green filed a notice of appeal in the Court of Common Pleas, Carbon County, seeking to overturn the Supervisors' denial of ten-

tative approval. The Court of Common Pleas did not receive additional evidence, and in an order entered June 19, 1987, affirmed the Supervisors' decision.

The Commonwealth Court reversed. In a decision published at 117 Pa. Commw. 396, 543 A.2d 1253 (1988), the court first noted that D.E.R., "which is charged with the duty to approve or disapprove, gave its preliminary approval for the feasibility" of the Pocono Green sewage treatment plans. 543 A.2d at 1253. Further, the court recognized that by submitting plans for a centralized sewage treatment system, together with the D.E.R. letter of approval of those plans, Pocono Green "conform[ed] with . . . 53 P.S. § 10701 . . . and the local ordinance." 543 A.2d at 1254. The court stated that the approval by D.E.R., and "the testimony of . . . a professional

engineer . . . that the proposed sewage system was 'feasible from an engineering standpoint,'" constitute "substantial evidence" of the "feasibility" of the plans, and that the statements at the public hearing before the Supervisors by the two residents about the receiving stream are insufficient as a matter of law to overcome the "substantial evidence" that Pocono Green adduced. Id.

For these reasons, the Commonwealth Court held that the Board of Supervisors "committed an error of law" and "abused its discretion in concluding that the developer had failed to sustain its burden of proving that the proposed sanitary waste disposal system was feasible." Id. Thus, the decision of the Court of Common Pleas was reversed, and the case was remanded with instructions "to enter an order directing the

Board of Supervisors of Kidder Township to grant preliminary approval of the developer's planned unit development." Id. This appeal by the Board of Supervisors followed.

ARGUMENT

The standard of review to be applied by this Court is well settled. When an appeal is taken from a decision by the Commonwealth Court, the decision should be upheld if the Commonwealth Court properly applied the governing legal principles. Lawner v. Engelbach, 433 Pa. 311, 315, 249 A.2d 295, 297 (1969). The Commonwealth Court, in turn, correctly applied the rule that a board of supervisors' denial of tentative approval for a PRD application must be overturned if the board "abused its discretion or committed an error of law." Pocono Green, 543 A.2d at 1254. See,

e.g., Council of the Borough of Baldwin v. Nernberg, 71 Pa. Commw. 642, 643, 455 A.2d 773 (1983). As shown below, the Commonwealth Court's decision ordering tentative approval must be affirmed for several independent and equally sufficient reasons.

I

BECAUSE KIDDER TOWNSHIP HAS COMPLETELY DEFERRED TO STATE STANDARDS ON SEWAGE TREATMENT, D.E.R. APPROVAL OF POCONO GREEN'S PRELIMINARY PLANS ESTABLISHES COMPLIANCE WITH TOWNSHIP REQUIREMENTS.

As this Court recently observed, the General Assembly has established a "comprehensive . . . statewide regulatory scheme" setting standard for the construction of community sewage treatment facilities and for the control of water pollution from such facilities. Council of Middletown Township v. Benham, 514 Pa. 176, 182, 523 A.2d 311, 314 (1986). That

"comprehensive . . . statewide regulatory scheme" consists of the Sewage Facilities Act, the Clean Streams Law, and the regulations that D.E.R. has promulgated pursuant to those statutes. 514 Pa. at 181-82, 523 A.2d at 313-14.

Under the Clean Streams Law, D.E.R. is the authority responsible for setting standards for the discharge of effluent from sewage treatment facilities into "the waters of this Commonwealth," which are defined to include "all . . . streams . . . [and] ponds." 35 P.S. §§ 691.1, 691.202. The Clean Streams Law assigns to D.E.R. "the power and . . . duty" to

> [e]stablish policies for effective water control . . . and be responsible for the development and implementation of <u>comprehensive</u> public water supply, waste management and other water supply plans.

<u>Id.</u> § 691.5(b)(2) (emphasis added) <u>See</u>

also id. § 691.4(5) (policies of Clean Streams Law require "a comprehensive program of watershed management and control") (emphasis added).

The Clean Streams Law further provides that the discharge of effluent from sewage treatment facilities into the waters of the Commonwealth is permitted only if "authorized by the rules and regulations of [D.E.R.] or . . . permit from [D.E.R.]." Id. § 691.202. Similarly, both the Clean Streams Law and the Sewage Facilities Act require that a person seeking to build a sewage treatment plant that will discharge its effluent into waters of the Commonwealth must first obtain D.E.R. approval of the plans and designs of the proposed treatment system, as well as the proposed location. Id. § 691.207 (Clean Streams Law), § 750.7(a) (Sewage Facilities

Act).[23]

D.E.R. has promulgated extensive regulations pursuant to the Clean Streams Law and the Sewage Facilities Act. For example, D.E.R. has prescribed detailed engineering standards for sewage disposal facilities, see 25 Pa. Code Chapter 73, and of central importance in this case, D.E.R. has issued comprehensive regulations classifying all of the streams in the Commonwealth, including the stream that Pocono Green proposes to use. Those regulations establish, for each class of stream, standards for the quality and volume of effluent that a sewage treatment facility can discharge, according to various criteria, such as the aquatic life that the stream supports and the stream's use for industry, agri-

[23]Local authorities do not have the power to issue such approval. Id.

culture, or recreation. See 25 Pa. Code Chapter 93.

In deference to the "comprehensive . . . statewide regulatory scheme" established by the legislature and D.E.R., Benham, supra, Kidder Township has refrained from enacting any of its own specifications for the design of sewage treatment facilities or the quality or volume of effluent that they can discharge into waters of the Commonwealth that are located in the Township. Rather, Kidder Township has explicitly deferred to D.E.R. in these matters. Thus, in its ordinance prescribing "design standards" for "multi-family dwelling subdivisions and developments." Subd. Ord. § 4.400 (App. 120), Kidder Township simply incorporates D.E.R. sewage treatment standards, without embellishment by the Township. See Subd. Ord.

§ 4.401 ("sewage systems . . . proposed to serve said developments shall comply with requirements of [D.E.R.]") (App. 120); Subd. Ord. § 4.204 ("subdivisions and land developments shall be served with . . . an adequate sewage system . . . acceptable to the appropriate State agency") (App. 109); Subd. Ord. § 4.204(b) ("Every sewage collection and treatment system shall be organized in such a way as to be bought under the jurisdiction of the appropriate State agency") (App. 109-10).

Similarly, the only requirement concerning sewage disposal in the Township Zoning Ordinance's provisions for PRDs is that they must be "attached to . . . a centralized sewage disposal system," Zon. Ord. § 4.403 (Use Class 14(i)), (App. 36), which the Township defines as a "system designed to collect,

centrally treat, and dispose of sewage from customers in compliance with [D.E.R.] regulations." Subd. Ord. § 2.230 (App. 85). See also Zon. Ord. § 2.145 (App. 15).[24] In sum, other than

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[24]The Township's ordinances purport to reserve authority to enact regulations "more stringent" than D.E.R.'s. Id. However, any attempt to do so would be invalid on preemption grounds. First, a local board does "not have jurisdiction as to the type of sewage system to be installed" at a particular site. Stewart v. Zoning Hearing Board of Radnor Township, 110 Pa. Commw. 111, 116-17, 531 A.2d 1180, 1183 (1987). See Benham, 514 Pa. at 181-82, 523 A.2d at 313 (local role limited to enforcement and administration of Sewage Facilities Act); Eckert v. Pierotti, 553 A.2d 114 (Pa. Commw. 1989).

Second, by assigning to D.E.R. "the power and . . . duty" to establish a "comprehensive" water quality program under the Clean Streams Law, 35 P.S. §§ 691.4(5), 691.5(b)(2), without assigning any role to local authorities, the legislature "has retained all regulatory and legislative power for [the state], and no local legislation is permitted," Benham, 514 Pa. at 181, 523 A.2d at 313, concerning standards for effluent discharge. Cf. id. n.6 (distinguishing Clean Streams and Sewage Facilities provisions).

In any event, the Court does not need to reach the preemption issue, be-

the state standards to which its ordinances explicitly defer, Kidder Township has adopted no standards on which the Supervisors could have lawfully relied on considering the feasibility of Pocono Green's plans for sewage treatment and disposal.

The Township's deferral to D.E.R. substantive standards for sewage treatment facilities is reflected in its procedures for obtaining approval of a preliminary subdivision plan. The only information concerning sewage treatment that is required in a preliminary subdivision plan submitted for approval in Kidder Township is "a letter from the Pennsylvania Department of Environmental Resources which states that the [sewage disposal] system meets the State of Penn-

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cause the Township has not even attempted to enact regulations more stringent than D.E.R.'s.

sylvania's minimum requirements." Subd. Ord. § 3.304(k)(2) (emphasis added) (App. 99). Pocono Green has satisfied the Township's requirement by submitting, as part of its preliminary plan, a letter in which D.E.R. certified that Pocono Green's "proposal . . . for sewage collection, treatment and disposal is acceptable to [D.E.R.]." (App. 155) Because Pocono Green has submitted this letter, the Supervisors abused their discretion by denying approval on the ground that Pocono Green's sewage treatment plans are not feasible.[25]

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[25]Because Kidder Township's regulations on PRD applications totally defer to D.E.R. sewage treatment standards, and compliance with those standards therefore establishes the "feasibility" of a preliminary PRD plan in Kidder Township, the Court does not need to determine what "feasibility" means under 53 P.S. § 1707. But even if the Court were to address that question, and even if the Supervisors had not conceded it, see supra note 1, the Commonwealth Court's definition should be adopted: "The term fea-

It is well established that a municipality cannot deny approval of a PRD application on the basis of "a standard not in its regulations." Montgomery Township v. Franchise Realty Interstate Corp., 54 Pa. Commw. 535, 538, 422 A.2d 897, 899 (1980); accord Akin v. South Middleton Township Zoning Hearing Board, 547 A.2d 883, 885 (Pa. Commw. 1988); Michaels Development Co. v. Benzinger Township Board of Supervisors, 50 Pa. Commw. 281, 288, 413 A.2d 743, 747 (1980). Only a few weeks ago, this Court forcefully upheld that rule in a closely related context. In Coretsky v. Board of Supervisors of Butler Township, No. 88

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sibility means that there is substantial evidence to support a finding that the solution of a problem is likely to succeed." 543 A.2d at 1254. See Mitchell Energy Corp. v. Zoning Hearing Board, 108 Pa. Commw. 113, 122, 529 A.2d 585, 588 (1987) (undefined words in land use statutes "must be given their plain, ordinary meaning").

W.D. 1987, ___ Pa. ___, 1989 Westlaw 17244 (March 3, 1989), the Court ruled that if a governing board denies approval for a subdivision, and its decision fails to cite explicitly the provisions in the ordinance on which denial is based, the application is deemed approved, even if all parties understood which provision the board had in mind.

Similarly, because municipalities have been given the power to enact "detailed development standards . . . [in a] planned residential development ordinance," it is "assum[ed] that compliance with those standards . . . lead[s] to approval." Doran Investments v. Muhlenburg Township Board of Commissioners, 10 Pa. Commw. 143, 148 n.1, 309 A.2d 450, 453 n.1 (1973). A governing body must not consider applications of approval of PRD plans on a "case by case"

basis, and cannot deny approval "whenever it concludes for any reason that the plan is not in the public interest." Id. "Having ventured into the area of unit development, the township cannot be permitted to change the rules of the game." Pomona Hill Associates, Ltd. v. East Bradford Township, 24 Chest. 319, 323 (1976). These principles follow from the "longstanding rule," reaffirmed in Benham, that "zoning ordinances should be strictly construed" against the municipality, i.e., in a way that "will least restrict the owner's use of the land," because they "are in derogation of [the] common law" presumption that any use is proper in the absence of a specific prohibition. Benham, 514 Pa. at 185, 523 A.2d at 315-16.

Under these principles, because Kidder Township has explicitly deferred

to Pennsylvania's "comprehensive . . . statewide regulatory scheme" governing sewage treatment and disposal, Benham, by requiring D.E.R. approval of a PRD's sewage treatment plans -- without adding any Township specifications -- and because D.E.R. has certified that Pocono Green's plans for sewage disposal satisfy D.E.R. requirements, Pocono Green's preliminary plan is entitled to tentative approval. By denying tentative approval, even though Pocono Green has complied with all applicable state and Township regulations, the Board of Supervisors "abused its discretion" and "committed an error of law." Council of the Borough of Baldwin v. Nernberg, 71 Pa. Commw. 642, 643, 455 A.2d 773 (1983). Therefore, this Court should affirm the decision of the Commonwealth Court.

II

THE SUPERVISORS' STATED REASONS FOR DENYING TENTATIVE APPROVAL ARE LEGALLY DEFICIENT.

Even assuming, arguendo, that D.E.R. approval of Pocono Green's preliminary plans for sewage treatment is not in and of itself sufficient to require tentative approval because of Kidder Township's deferral to D.E.R. standards, the Commonwealth Court's decision should be affirmed on the additional ground that the Supervisors' stated reasons for denying tentative approval are deficient as a matter of law.

A. The Board's Factual Findings are Legally Insufficient to Support its Decision.

The Supervisors found that Pocono Green's sewage treatment plans are not feasible because, according to the Board's decision, "the proposed sewage treatment plant . . . will discharge into

a stream which runs dry and leads into a pond that does not discharge . . . except in flooding." (App. 170) A conclusion of nonfeasibility based on such a finding has no support in the Township's land use ordinances and flatly contradicts D.E.R. regulations.

As explained above, a municipality cannot deny approval of a PRD application on grounds not contained in its ordinances. Supra pp. 18-19. For example, in Michaels Development Co. v. Benzinger Township Board of Supervisors, 50 Pa. Commw. 281, 413 A.2d 743 (1980), the developer's plan complied with the township's PRD ordinance, but the board of supervisors nevertheless denied approval because it found that the location of the common open space envisioned in the plan was not in the public interest. The court emphatically rejected the

board's position: "The Board's objection cannot be upheld; the Ordinance contains no standards regarding location [of common open space]." 50 Pa. Commw. at 288, 413 A.2d at 747. Therefore, the court ordered tentative approval granted. 50 Pa. Commw. at 290, 413 A.2d at 748.

Kidder Township's land ordinances use do not contain any restrictions regarding discharge of effluent into the stream indicated in Pocono Green's plan. Nor do the Township's ordinances contain any general restriction on discharging effluent into streams that run dry or flow into ponds, regardless of how such ponds drain. In the absence of such restrictions in the Township's ordinances, "[t]he Board's objection cannot be upheld." Michaels,

supra.[26]

Furthermore, the Board's speculation that it is unfeasible to discharge treated effluent into a stream that runs dry, or a stream that flows into a pond that drains by flooding, flatly contradicts D.E.R. regulations. As noted above (supra pp. 14-15), D.E.R. has classified all the waters of the Commonwealth and has established, for each class of stream, standards for discharging treated effluent. See 25 Pa. Code Chapter 93. Under D.E.R. regulations, those standards are based on what D.E.R. calls "design flow" -- a long-range, highly stream-protective view of data that D.E.R. has assembled on the flow of water in each stream -- the "lowest 7-consecutive-day

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[26]Even if Kidder Township were to attempt to enact an ordinance imposing such restrictions, such an ordinance would be invalid on preemption grounds. See supra note 5.

average flow that occurs once in 10 years." 25 Pa. Code § 93.5(b). D.E.R.'s explanation of its use of design flow data explicitly takes into account that some streams occasionally run dry:

> Where the lowest 7-consecutive-day average flow that occurs once in 10 years is zero, the Department shall specify the design flow based on the identified or estimated flow at that point where a use identified in § 93.4 (relating to statewide water uses) becomes possible.

Id. (emphasis added). Section 93.4, in turn, lists various uses of streams, such as support of warm-water aquatic life, removal of water for irrigation or industry, and assorted recreational uses. Id. § 93.4(a). D.E.R. allows discharge of effluent into streams having all of those uses, whether or not such streams run dry. See § 93.7 (Table 5) Furthermore, D.E.R. makes no distinction -- insofar as the ability to accommodate ef-

fluent is concerned -- between streams that flow into ponds, regardless of how such ponds drain, and streams that flow elsewhere. See 25 Pa. Code Chapter 93.

In sum, D.E.R. regulations specifically allow sewage treatment plants to discharge effluent into streams that run dry, and D.E.R. does not restrict such discharge if a stream flows into a pond, regardless of how the pond drains. Because the Supervisors' decision is based on pure speculation that such conditions would create a hazard, and because such speculation is contrary to the "comprehensive . . . statewide regulatory scheme" established by D.E.R., Benham, the Commonwealth Court correctly held that the Supervisors' decision was an error of law.

B. The Board of Supervisors Failed to Provide Specific Objections to Pocono Green's Plan.

An independent ground for affirming the Commonwealth Court's decision is that the Board of Supervisors' conclusion -- that Pocono Green's proposed sewage treatment system is unfeasible -- is based on several unarticulated assumptions, leaving many essential questions unanswered as to how the Supervisors reached their conclusion. Under settled case law that has developed specifically in the area of land use, such a failure by a municipality to substantiate its decision is itself grounds for reversal.

The Supervisors did not make any specific findings concerning the characteristics of the stream and pond in question, or the effects of the proposed sewage treatment plant on them. How often does the stream run dry? What uses

of the receiving stream should be protected? What, if any, damage might the effluent cause to such uses? What quality or volume of effluent would be acceptable? What is the pond's normal level? At what level does it "flood," and how often does it thereby drain? Where does the outflow from the pond go? Is the outflow a hazard now? How would the sewage treatment system create a hazard or exacerbate an existing hazard? Why is the "renovative" effect of the stream between the discharge point and the pond (testimony of J. Burke, Hearing 70) insufficient?

These questions go to the heart of the Supervisors' conclusion on feasibility. By leaving them unanswered, the Supervisors failed to show whether their conclusion has any rational basis.

The MPC requires that when a municipality denies tentative approval for a PRD plan, the municipality must "set forth with particularity in what respects the development . . . would not be in the public interest." 53 P.S. § 10709(b). The courts have rigorously applied this provision, and have required governing boards "to advance public interest objections . . . of an exceptional and specific nature." Council of the Borough of Baldwin v. Nernberg, 71 Pa. Commw. 642, 644, 455 A.2d 773, 774 (1983) (affirming decision to Judge (now Justice) Papadakos). The board must "tell why a hazard would result [and] exactly why [the plan's] provisions for [the potential hazard] are not adequate," rather than "indulg[ing] . . . in vague generalities." Doran Investments v. Muhlenberg Township Board of Commissioners,

10 Pa. Commw. 143, 159-160, 309 A.2d 450, 458-59 (1973).

Here, by leaving the questions noted above unanswered, the Supervisors failed to comply with the dictates of the MPC. The Commonwealth Court's decision ordering tentative approval should therefore be affirmed.

C. The State's Requirement of Obtaining Final D.E.R. Approval Fully Protects The Public Interest.

It is well settled that even when a governing board adequately substantiates potential problems in a PRD preliminary plan -- which in this case the Supervisors utterly failed to do -- the proper action for the board to take is not to deny tentative approval, but to grant approval subject to the condition that the final plan must address the potential problems that the board has raised. See, e.g., Hakim v. Board of

Commissioners of O'Hara Township, 19 Pa. Commw. 661, 667-68, 339 A.2d 905, 909 (1975); Doran, 10 Pa. Commw. at 148 n.1, 160, 309 A.2d at 453 n.1, 458.

In Pomona Hill, 24 Chest. 319 (1976), for example, tentative approval was ordered for a PRD plan whose provisions for sewage treatment were much less complete than the Pocono Green plan:

> The Board . . . found that a Sewer Authority was considering providing sewage treatment service and that the developer, in the alternative, would apply for permission to build a treatment plant. The Board concluded that since neither alternative had in fact been approved, the provision was inadequate. Again the Board ignores . . . the fact that only tentative approval is sought . . . [S]uch approvals should properly be the subject of a condition to tentative approval, and not the basis for denial.

Id. at 324 (emphasis added). See Stein v. Easttown Township Board of Supervisors, 110 Pa. Commw. 293, 306, 532 A.2d

906, 912-13 (1987) (where D.E.R. approval is applied for but not yet obtained, it is "more reasonable to condition final subdivision approval upon the issuance of this . . . permit than to abort the plan at conception").[27]

The grounds for ordering tentative approval are even more compelling in this case than in Pomona Hill and Stein. Here D.E.R. has already certified that Pocono Green's "proposal . . . for sewage

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[27]Similarly, in Rees v. Board of Supervisors of Indiana Township, 99 Pa. Commw. 452, 513 A.2d 584 (1986), the court held that tentative approval was properly granted on the basis of the applicant's undertaking to "adequately provide for the public health, safety and welfare, and remedy" objections concerning sewage disposal. 99 Pa. Commw. at 456, 513 A.2d at 586. The Supervisors' reliance (Brief p. 8) on a passing remark in Rees concerning the validity of the objection is unavailing. That remark was dictum (the court affirmed the grant of tentative approval); there is no indication that the applicant had obtained D.E.R. approval; and the court was not called upon to address the applicable D.E.R. regulations.

collection, treatment and disposal is acceptable to [D.E.R.]." (App. 155) An explicit condition of final D.E.R. approval is unnecessary, because, as explained above, the Clean Streams Law and the Sewage Facilities Act require that any central sewage treatment facility must be built pursuant to a D.E.R. permit and must comply with those statutes and the regulations promulgated pursuant to them. Supra pp. 14-15. These state-imposed conditions ensure that Pocono Green's sewage treatment facility will operate in a manner consistent with the public interest. Because the Supervisors failed to address the protections provided by state law, the Commonwealth Court correctly held that the Supervisors' denial of tentative approval was an abuse of discretion.

These considerations are especially critical because of the time that has passed since Pocono Green submitted its application. The remarks of the Commonwealth Court, in a case that consumed approximately three years from the time of application until that court's decision, are pertinent here:

> The time has come . . . for the Township to cease its foot-dragging, nit-picking, and logic-chopping. If the [developer] is not granted prompt and comprehensive relief, its . . . legal victories in this prolonged litigation will be indistinguishable from defeat.

Township of Plymouth v. County of Montgomery, 550 A.2d 1033, 1040 (Pa. Commw. 1988). Thus, because of the protections provided by state law, and in light of the time that has passed since Pocono Green submitted its application, it would be especially improper to permit the Supervisors to impose any explicit condi-

tions concerning sewage treatment. The Commonwealth Court's order should be affirmed in its entirety.

III

THE SUPERVISORS' FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Commonwealth Court's decision should be affirmed for the additional reason that the Supervisors did not provide legally sufficient evidentiary support for their factual findings. It is well within this Court's scope of review to reverse the Supervisors' findings if they "are not supported by substantial evidence." Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 555, 462 A.2d 637, 640 (1983). This Court has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. See also Michaels, 50 Pa. Commw. at 286, 413 A.2d

at 747 (public interest objections to PRD plan must have "legitimate basis in law and fact"). As shown below, the Supervisors' findings contradict D.E.R.'s findings and in any event are not supported on the record.

The Report on Sewage and Water Facilities submitted to Kidder Township by Pocono Green as part of the application for approval of its preliminary plan describes the receiving stream as follows: "Final treated effluent will be discharged to an unnamed tributary of the Lehigh River," and the "point of effluent discharge is located at 41°-03'-00" N latitude and 75°-45'-00" W longitude." (App. 139-40)[28] That stream and other

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[28]The Supervisors assert that the Sewage and Water Report was not "introduced at the hearing." (Brief p. 8) In fact, Pocono Green's engineer stated at the hearing that D.E.R.'s letter was a response to plans submitted to D.E.R. (Hearing 46) Moreover, it is indis-

Lehigh tributaries in the same area have been classified in D.E.R. regulations as "high quality cold water fisheries." 25 Pa. Code § 93.9 (List D), p. 93-28; id. § 93.3.[29] D.E.R. requires that treated effluent discharged into such a stream must meet D.E.R.'s most stringent criteria for effluent quality. See id. § 93.7, pp. 93-13, 14; § 93.7(e). Because D.E.R. has certified, pursuant to those criteria, that Pocono Green's sewage treatment proposal "is acceptable to [D.E.R.]" (App.

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putable that the Report was part of the application submitted to the Supervisors. (See Pocono Green Appendix 137; Board of Supervisors R. 5a (truncated page of Report)).

[29]D.E.R. regulations list the stream as an "unnamed tributary to the Lehigh River." Id. While participants at the hearing before the Supervisors referred to the stream as "Slaughterhouse Creek" and "Shantyhouse Creek" (App. 157), no stream by either name appears in the map contained in the Kidder Township Zoning Ordinance (App. 75), or in the D.E.R. lists for Carbon County. See 25 Pa. Code § 93.9.

155), the Supervisors' finding of non-feasibility is erroneous as a matter of law.

Furthermore, as noted in Section II.B above, the Supervisors failed to make any findings whatsoever about the capabilities of Pocono Green's proposed method of sewage treatment, the engineering characteristics of the treatment plant, or the specific effect of the treatment plant on the stream or its uses. In the absence of such evidence in the record, and in light of the D.E.R. regulations addressing the quality of effluent that may be discharged into the stream, consistent with its protected uses, the Supervisors' bare conclusion of nonfeasibility is devoid of "a legitimate basis in . . . fact." Michaels, 50 Pa. Commw. at 286, 413 A.2d at 747. For that additional reason, the Commonwealth Court

correctly determined that the Board of Supervisors "abused its discretion." Pocono Green, 543 A.2d at 1254.

CONCLUSION

For the reasons stated above, the order of the Commonwealth Court should be affirmed, and the Board of Supervisors should be ordered to grant the application of Pocono Green, Inc. for tentative approval.

Dated: Paoli, Pa.
March 27, 1989

Respectfully submitted,

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